

03487

1 IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON

2 IN AND FOR KING COUNTY

3
4 STATE OF WASHINGTON,) No. 96-2-15056 SEA
5)
6 Plaintiff,)
7)
8 vs.)
9)
10 AMERICAN TOBACCO CO.; BROWN &)
11 WILLIAMSON TOBACCO CORP.; LIGGETT)
12 & MEYERS, INC.; LORILLARD TOBACCO)
13 CO., INC.; PHILIP MORRIS, INC.;)
14 R.J. REYNOLDS TOBACCO CO.; B.A.T.)
15 INDUSTRIES, P.L.C.; HILL &)
16 KNOWLTON, INC.; THE COUNCIL FOR)
17 TOBACCO RESEARCH-U.S.A., INC.;)
18 TOBACCO INSTITUTE, INC.; foreign)
19 corporations; and unknown corpor-)
20 corporations; and JOHN DOE 1 - 100,)
21 and JANE DOE 1 - 100, individuals,)
22 Defendants.)
23)
24)

14 TRANSCRIPT OF PROCEEDINGS

15 taken before the HONORABLE GEORGE A. FINKLE, Judge,
16 at the King County Courthouse, Seattle, Washington,
17 beginning at 9:00 a.m., Thursday, October 22, 1998.
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21

22 REPORTED BY: Barry Fanning, RPR
23 James D. Lavielle, RPR
24 Official Court Reporter
State of Washington

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1 I N D E X

2 Witness Name D C RD RC
3 John Solow 3492

5 E X H I B I T S

7 Exhibit No. Offered Admitted
8 WX168 3513 3513

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1 Seattle, Washington, 10/22/98, 9:00 a.m.

2 THE COURT: Please sit down.

3 CROSS-EXAMINATION (Cont.)

4 BY MR. WEBB:

5 Q Good morning, Doctor.

6 A Good morning.

7 Q Pick up where we left off?

8 A Mr. Webb, before we pick up, yesterday I
9 think I promised you to find a document that indicated
10 when Liggett & Myers, in my opinion, was back in the
11 cartel, and I found such a document.

12 Q Tell us the exhibit number.

13 A It's Exhibit 404, I believe.

14 Q You can read it into the record. For the
15 record, the witness is reading from State's Exhibit
16 404.

17 A I believe -- I understand it to be a Liggett
18 document, the identification number starting with LG,
19 I understand that to mean this is a Liggett document.
20 I believe it is a memorandum dated January 13, 1964
21 describing a meeting of the Tobacco Institute
22 executive committee, which was held Sunday, January
23 12, 1964, which I believe was shortly after, maybe
24 even the day after the surgeon general's report came
25 out, and it actually states a variety of things but in

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1 particular it says, it is considered to be of prime
2 importance that the industry maintain a united front
3 and that if one or more companies were to conduct
4 themselves as a matter of self-interest, particularly
5 this advertising obvious vulnerability would be the
6 result.

7 And the document goes on to deal with how the
8 industry feels it should respond or might need to
9 respond to the surgeon general's report, particularly
10 in light of the concerns about litigation that I
11 mentioned earlier. I believe that Liggett & Myers was
12 at that meeting and was taking part in, at least at
13 that time, in maintaining a united front, particularly
14 in advertising. I guess at least as of January 13,
15 1964 I would place Liggett back in the conspiracy.

16 Q My question was, I wanted to know if you
17 could find a document that would show you when the
18 date was, if I understand you are saying you believe
19 they were at least part of this arrangement by January

20 of 1964?

21 A That is correct.

22 Q Did you find a document that tells you when
23 they joined this so-called arrangement?

24 A No. As I said yesterday, this is a puzzle
25 with missing pieces and I can't find the document that
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1 says specifically the date at which they joined,
2 however it seems to me that certainly by January 1964
3 they were part of the arrangement.

4 Q You keep talking about the puzzle and missing
5 pieces. I'll ask you as an economist, is it fair to
6 say that if you have a puzzle that has some missing
7 pieces, then you don't have a picture in the first
8 place? We don't get a complete picture, do we?

9 A You're unlikely to ever get a complete
10 picture in situations like this, but I believe that
11 you put the puzzle together and draw your conclusions
12 and opinions from that. I think there are
13 sufficiently many pieces in the puzzle and they hang
14 together in a particular way that they lead me to the
15 opinions that I've discussed.

16 Q Let's continue to talk about those opinions.
17 We left off yesterday at the end of the day I had --
18 when we recessed at the end of the day I had showed
19 you, if you remember, these 1954 tobacco company
20 filter ads. Remember that?

21 A That's correct.

22 Q And they appeared in various publications in
23 1954 after the Plaza Hotel meeting and you say that
24 this arrangement to not advertise on the basis of
25 health was entered into, is that correct?

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1 A Yes.

2 Q Now let's continue with the story. Am I
3 correct that in September of 1954, after these filter
4 ads had been running for several months, the Federal
5 Trade Commission stepped in and sent a letter to all
6 the major tobacco companies and enclosed a draft set
7 of advertising guidelines that the FTC was considering
8 implementing? Is that correct?

9 A That is correct. Before we go on to that, if
10 I might --

11 Q No, actually let me -- can you answer that
12 question, please?

13 A I thought I did. I said yes, that's correct.

14 Q I'll ask you this question, though. When Mr.
15 Ferguson was asking you questions about the Federal
16 Trade Commission and how it interacts with the tobacco
17 companies, do you think you gave the jury a full and
18 complete picture of what the Federal Trade Commission
19 was actually doing in regulating these tobacco
20 companies after the Plaza Hotel meeting in December of
21 1953, Doctor?

22 A I believe I've given the jury my best
23 understanding of how the Federal Trade Commission
24 guidelines work and how the -- what the Federal Trade
25 Commission guidelines represent.

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1 Q Do you think you gave the jury a complete and
2 accurate picture of exactly what the Federal Trade
3 Commission did in 1954 in 1955, in 1960, in 1966 and
4 1970 as they implemented new procedures that governed

5 cigarette advertising?

6 A I'll respond the same way I think I answered
7 the questions honestly with regard to my understanding
8 of how the Federal Trade Commission guidelines work
9 and whatever I was asked to answer I answered.

10 Q Yesterday you testified to this jury that --
11 you told the jury that if we look at the tobacco
12 company conduct in connection with advertising health
13 claims after the December 1953 Plaza Hotel meeting you
14 told the jury that that conduct and what they did in
15 their advertising is consistent with the existence of
16 this anti-competitive arrangement not to advertise on
17 the basis of health. Is that correct?

18 A Yes, that's correct. For example, when I
19 was explaining that arrangement during my direct
20 examination we put up and the plaintiffs put up and I
21 discussed some advertising by Philip Morris, by the
22 company that you represent, which demonstrated the
23 change in advertising that took place prior to the
24 September 1954 announcement by the FTC that you just
25 mentioned.

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1 In June of 1954, as I said before, Business
2 Week ran an article which in particular mentioned
3 Philip Morris's advertising, advertising of the
4 company that you represent which said that there was a
5 change, a nearly unanimous change in the industry.
6 The argument is quite interesting, it lists company by
7 company, brand by brand, and notes the changes in all
8 of them. Philip Morris, it says, went from
9 advertising cigarettes that took the fear out of
10 smoking to writing lyrics about the pleasure of
11 smoking.

12 I showed -- they were a little difficult to
13 read, but I showed on the view graph how Philip
14 Morris's ads changed. One of the interesting things
15 about the article in Business Week is it says
16 Chesterfield, the Liggett & Myers brand, for some
17 reason had chosen not to leave the fear advertising.
18 I think that is consistent with the meeting that we
19 spoke about. That's all prior to the 1954
20 announcement that you just mentioned.

21 Q Very interesting. Do you mind answering my
22 question?

23 A Repeat the question.

24 Q All I'm asking you is, did you tell the jury
25 that if we look at the conduct of the tobacco

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1 companies after the Plaza Hotel meeting that you
2 believe their conduct is consistent with this economic
3 theory you have that they entered into an arrangement
4 not to advertise on the basis of health?

5 A Yes.

6 MR. FERGUSON: Objection.

7 THE WITNESS: Yes. The answer I just gave
8 was in reference to their conduct subsequent to that
9 meeting in 1954 before the FTC had done anything.

10 BY MR. WEBB:

11 Q My question to you is, if we actually go
12 back -- and by the way, do you agree that rather
13 than reading some article that you said you read, you
14 told the jury you just read an article?

15 A Among other things, yes.

16 Q Do you think it might be more helpful to look
17 at the actual ad they ran in the publication, would
18 that be more helpful?

19 A Helpful to look at the ad and before and
20 after, not talking about what the ads said but really
21 the change in what the ads said to evaluate the change
22 in what the ads said, it would be useful to look at
23 the ads before and after.

24 Q You showed the jury the ads that were running
25 before, during the time that Mr. Ferguson was asking

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1 you questions, do you remember that?

2 A We also showed some ads before and after,
3 although I confess they were a little bit difficult to
4 see.

5 Q Yesterday, in fairness, I showed you one of
6 the ads again that you had showed the jury during Mr.
7 Ferguson's questioning about throat irritation.
8 Remember that yesterday?

9 A Yes.

10 Q Here is the question. If we actually take
11 the jury back to 1954 and 1955 and look at what the
12 FTC was actually doing, don't you see evidence that
13 the tobacco companies' advertising had nothing to do
14 with the collusive agreement but had everything to do
15 with what the Federal Trade Commission was telling the
16 tobacco companies they could and could not do? Isn't
17 that true?

18 A No, I simply would not characterize that as
19 correct.

20 Q Start with -- tell the jury, first of all,
21 what is the Federal Trade Commission?

22 A The Federal Trade Commission is an
23 organization of -- branch of the United States
24 government that has -- I'll be broad, because I can't
25 tell you the legal, but two main concerns. One is its

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1 charged to protect consumers against false and
2 deceptive advertising, and the other is that it's one
3 of the two organizations in the government that
4 enforces the antitrust laws.

5 Q Is it correct that the Federal Trade
6 Commission has the power to regulate cigarette
7 advertising?

8 A I believe it has the power to regulate
9 advertising of all sorts with regard to their
10 deceptiveness or falseness, yes.

11 Q Does that include cigarettes?

12 A Yes.

13 Q That's all I'm asking. So we know that they
14 have the power to regulate cigarette advertising,
15 don't we?

16 A Yes, they do.

17 Q And if they don't like cigarette ads, they
18 have the power to try to take legal action to stop the
19 ads on theory they are false and misleading?

20 A As I understand it, they have the authority
21 to institute actions to take companies, including
22 cigarette companies, to court if they feel that they
23 are -- their advertisements are misleading, and they
24 would have to win those fights in court.

25 Q If we go back and look at what was really

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1 going on at the time of the Plaza Hotel meeting in
2 December 1953, you have discovered in your preparation
3 for this case, haven't you, that at that time, right
4 at the time of the Plaza Hotel meeting that the
5 Federal Trade Commission had already started
6 challenging those types of ads that were running
7 before the 1953 meeting that you told the jury are
8 health ads. Is that true?

9 A I believe that's true. If they were false
10 and deceptive advertisements, then I would expect the
11 Federal Trade Commission to take action against them.
12 When Old Gold said there was not a cough in a carload,
13 if there is no real evidence to believe or
14 substantiate that, that is really a false claim, then
15 I would expect the FTC to take on the companies that
16 would make the claim.

17 Q The truth is that you discovered when you
18 went back that the FTC had already jumped in to come
19 after the tobacco companies for those ads, the FTC
20 had already done that by the time we get to December
21 1953, is that correct?

22 A If they were false they -- presumably false
23 advertisements, yes, I believe on occasion they did.

24 Q I'll show the jury a document I think that
25 will establish that.

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1 I'm now going to show the witness an exhibit
2 that is in evidence as Defendant's Exhibit WX167.

3 Just so you see what you're looking at here,
4 this is a report dated May 1981, actually prepared by
5 the Federal Trade Commission. It's the Federal Trade
6 Commission staff report on cigarette -- on the
7 cigarette advertising investigation by Matthew L.
8 Meyers, program adviser, and others working with him.
9 Do you see that?

10 A Yes.

11 Q And he goes through a history of the
12 regulations of advertising.

13 Have you seen this document before in
14 preparing for your testimony?

15 A No.

16 Q On the first page of this report he goes
17 through and starts to talk about the history and the
18 role of the Federal Trade Commission in connection
19 with cigarette advertising, and what he says here is
20 that cigarette advertising has been a major concern of
21 the Federal Trade Commission since it began examining
22 cigarette advertising in the late 1930s. The
23 commission's first actions sought to prevent cigarette
24 companies from making unsupported claims about the
25 medical and other benefits of particular brands.

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1 Between 1945 and 1960 the commission issued 7
2 cease and desist orders in prohibiting various false
3 claims in cigarette advertising, and if we actually go
4 down and look at that footnote we actually see that
5 the Federal Trade Commission had already taken action
6 against some of the companies you have been talking
7 about, is that correct?

8 A Apparently they were making false or
9 unsubstantiated claims, apparently the members of the
10 tobacco industry had told the public untrue statements
11 about their products in their advertisements, or at

12 least the Federal Trade Commission believed they were
13 lying to the public, and they took them on on those
14 claims.

15 Q Under your economic theory, if the tobacco
16 companies were running health ads prior to 1953 that
17 were wrong or false or misleading, they should stop
18 doing that?

19 A I want to be cautious exactly how I want a
20 characterize this.

21 Q Answer that question. Can you answer that
22 question?

23 MR. FERGUSON: I believe he is trying to
24 answer. Object.

25 THE COURT: Go ahead, if you are answering
03504

1 the question.

2 THE WITNESS: Repeat the question.

3 BY MR. WEBB:

4 Q I'm asking you under these economic theories
5 that you brought into our courtroom, I'm asking you
6 that if the tobacco companies were running ads that
7 the Federal Trade Commission thought were deceptive,
8 shouldn't the tobacco companies stop running those
9 ads?

10 A The economic theory that I'm trying to
11 explain to the jury has to do with the agreements or
12 collusion among firms to advertise on the basis of
13 health and safety. I believe that companies as a
14 general matter should not be lying to the public, they
15 should make truthful claims about their product and
16 that's why as a society we have things like the
17 Federal Trade Commission, to prevent companies like
18 the cigarette companies from making false,
19 unsubstantiated claims to their consumers.

20 The theory that I'm trying to explain to the
21 jury has to do with agreements among firms to make
22 advertisements, whether true or false. Yes, I think
23 they should stop making false health claims.

24 Q If the tobacco companies decided not to make
25 those health claims any longer because of action by

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1 the FTC, that is a lot different than your theory that
2 they stopped making these ads because of some
3 arrangement that was entered into, is that correct?

4 A No, I would not -- I do not think that's a
5 correct characterization of my testimony in the
6 slightest.

7 Q Am I correct that if it turned out that the
8 evidence established that the tobacco companies
9 decided to stop making those ads because, one, the FTC
10 had attacked them, and number two, because of when
11 there is articles connecting smoking to cancer, if
12 that was the reason as opposed to a collusive
13 agreement that was entered into, that destroys your
14 whole economic approach to this case, doesn't it?

15 A If that were the fact, it would, but I
16 believe that the arrangement was not to make truthful
17 advertisements on the basis of health. I certainly
18 think that the cigarette companies should not be
19 making false claims, should not be deceiving the
20 public in their advertising copy, as apparently they
21 were in the '30s, at least in the view of the FTC they
22 were making false advertising claims and the FTC

23 stopped some of those.
24 I believe that the arrangement was an
25 arrangement not to make substantial truthful health

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1 claims and that that's the reason, it's the fact that
2 the industry knew it had claims that it could
3 substantiate, that it could show were true, and chose
4 not to make them and I don't see why that would be --
5 I don't see why that would be prevented by the FTC,
6 and in fact the documents I've read suggest that the
7 industry, firms in the industry didn't believe that
8 they would be prevented from making truthful,
9 substantionable claims by the FTC.

10 Q Let's show the jury what happened as far as
11 your theory that the tobacco companies -- strike the
12 question.

13 Walk through exactly what happened. So am I
14 correct that if we go back and look at what actually
15 happened is that we find out that on September 14,
16 1954 the Federal Trade Commission sent a letter to
17 each cigarette manufacturer that enclosed a suggested
18 set of advertising guidelines, which guidelines would
19 not allow the tobacco companies to make any health
20 claims in ads? Isn't that correct?

21 A I think I know they sent a letter, I even
22 believe they had meetings with each of the companies.

23 Q I'll get to that in a minute.

24 A What exactly the guidelines say would help to
25 have guidelines up and important to understand how

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1 guidelines work.

2 Q Is the answer to my question yes?

3 A I believe they sent a letter on September 14,
4 I think you said, yes.

5 Q You have seen that from your preparation for
6 this case, is that fair to say?

7 A I don't think I've seen the letter, but I'm
8 familiar it was sent out.

9 Q You've seen it referenced in some of the
10 materials you reviewed?

11 A Yes.

12 Q You found out that the reason the Federal
13 Trade Commission sent that letter to the tobacco
14 companies was because of the type of ads that I was
15 showing you yesterday, those filter ads claiming that
16 filters were more effective, claiming their filter was
17 better than someone else's filter.

18 Did your materials reflect to you that's why
19 the Federal Trade Commission came after the tobacco
20 companies in September 1954?

21 A I'm not sure I would characterize it as
22 coming after the tobacco industry, I believe that the
23 Federal Trade Commission was concerned about the truth
24 of the cigarette companies' advertising. That's their
25 job, to see to it the companies only tell the truth in

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1 their advertising, and they were concerned about the
2 truth of some of those ads.

3 Q The ads I showed you yesterday, you told the
4 jury that you recognized those were filter ads that
5 contained health claims?

6 A I think I would say some of them were and
7 some of them weren't and some of them were, again I

8 think it's important to compare the sorts of health
9 claims that the pushing up to the edge of what
10 constitutes a health claim, those ads compared to the
11 more obvious health claims, like go back to the
12 Viceroy ads that said double barreled filtering for
13 double barreled health protection or the health guard
14 filter, then later on to say double barreled
15 filter for smoking pleasure but mentions the tar and
16 nicotine rating, the first is quite clearly a health
17 claim, the second one is pushing toward the edge.

18 Q If you want ads back out, I can --

19 A That is okay.

20 Q In fairness, you agree that those ads I
21 showed you yesterday, many of the ads I showed you
22 showed one tobacco company trying to compete against
23 another by claiming that his company's filter was more
24 effective than another company's filter?

25 A I think that some of them said yes -- put

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1 this way that they were trying to compete on the basis
2 of having a better filter. Whether that was a
3 healthier filter or a filter that was better for taste
4 and pleasure, what sort of inference the consumer
5 would draw from the line that said this is a better
6 filter, that is in the minds of consumers who read the
7 ad.

8 Q The jury saw the ad yesterday, I'll move on.
9 The fact to the extent that those ads showed that
10 tobacco companies in 1954, after the Plaza Hotel
11 meeting were still competing against each other by
12 advertising filters as health claims, that is
13 inconsistent with your whole theory that there is an
14 arrangement entered into?

15 A No, I disagree with that.

16 Q I'll ask you this, then, do you agree that
17 the tobacco companies need to pay attention to the
18 Federal Trade Commission?

19 A Yes.

20 Q And when that September letter went out in
21 1954, the September letter went out to the tobacco
22 companies from the Federal Trade Commission enclosing
23 these new proposed guidelines, I think you just told
24 us a moment ago the next thing that happened was there
25 was a series of meetings that took place between

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1 representatives of the Federal Trade Commission and
2 the various tobacco companies to discuss those filter
3 ads, is that correct?

4 A I'm not sure what -- my impression was it was
5 to discuss those guidelines.

6 Q Were the guidelines a response to the filter
7 ads?

8 A I believe the guidelines were in response to
9 the FTC's concern that the tobacco companies had been
10 misleading the public with false advertising. I'm not
11 sure that it was specifically about the filter ads.
12 As the document that you've just put up said, they had
13 been concerned since the 1930s about false advertising
14 in the cigarette industry.

15 Q There was a series of meetings that took
16 place in the fall of 1954, is that correct?

17 A That's correct.

18 Q And as a result of those meetings, the

19 tobacco companies voluntarily agreed to stop running
20 those type of filter ads, is that correct?
21 A I think they agreed to stop advertising on
22 the basis of health largely as a result of the meeting
23 they held at the Plaza Hotel prior to that.
24 Q I'm asking did you see in the materials that
25 you reviewed that the Federal Trade Commission had

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1 meetings with the tobacco companies after they had
2 sent the proposed guidelines to them, and that as a
3 result of those meetings, as a result of those
4 meetings the tobacco companies agreed to stop running
5 those filter ads?

6 MR. FERGUSON: Asked and answered. I object.

7 THE COURT: Overruled.

8 THE WITNESS: No, I can't recall having seen
9 that.

10 BY MR. WEBB:

11 Q Let me show you a document that is marked as
12 Defendant's Exhibit WX168.

13 Which, Your Honor, this is not in evidence
14 and I won't publish to the jury.

15 Ask you to look at this to see if this might
16 help refresh your recollection about what was actually
17 going on back in 1954.

18 Do you see that this is a document that
19 reflects a hearing before a Congressional subcommittee
20 in 1957?

21 A I've never seen this, give me a minute.

22 Q I want to show -- look at the front page you
23 will get the date I'm --

24 A I looked, I'm sorry. Yes, I see it. Yes.

25 Q Go to the next page, you will see another

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1 date that there was a particular hearing on Friday
2 July 26, 1957. See that?

3 A Yes.

4 Q And then go to the next page. I'll show you
5 what I'm calling your attention to. Do you see down
6 on the right-hand side the acting chairman of the
7 Federal Trade Commission, Mr. Secrest appeared before
8 this committee?

9 A Yes.

10 Q And you will see that he is giving that
11 history of the 1950s of what was going on with
12 cigarette ads, and to call your attention if you go
13 over two more pages to page 276, do you have that?

14 A Yes.

15 Q And if you go down to the middle of the page
16 he recites, starts at the beginning by saying on
17 September 14, and he discusses this letter. See
18 that?

19 A Yes.

20 Q Read that to yourself.

21 A Okay.

22 Q Now if you go over to the next page -- so
23 you're with me, right, in the next column?

24 A Yes.

25 Q The commissioner of the FTC describes the

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1 type of ads that he said had been running before the
2 commission adopted the guidelines?

3 A Yes.

4 Q Are you with me?
5 A Yes.
6 Q And he describes the type of filters that
7 they were objecting to, maximum filtration, effective
8 filtration, superior filtration. See that?
9 A Yes.
10 Q Does that appear to you that what the FTC was
11 concerned about back in 1954 was the filter ads, like
12 I showed you yesterday?
13 MR. FERGUSON: I thought the document was
14 showed to the witness to refresh his recollection, not
15 to read the contents into the record.
16 THE COURT: Sustained.
17 MR. WEBB: Offer into evidence.
18 THE COURT: Any objection?
19 MR. FERGUSON: No.
20 THE COURT: Admitted.
21 (Exhibit WX168 was
22 admitted in evidence.)
23 THE WITNESS: Appears to me that the Federal
24 Trade Commission was interested in the truthfulness of
25 the advertising claim of the filtration advertising

03514

1 claim, that is correct?
2 BY MR. WEBB:
3 Q Let's --
4 A The truthfulness. Not the facts, but the
5 truthfulness of this advertising claim, that is
6 correct.
7 Q See what --
8 A That's what the FTC does.
9 Q Show the jury this document. This is a
10 hearing held at Congress on false and misleading
11 advertising, and the actual date is hard to read
12 there, but it's 1957. Go to the next page, easier to
13 read. Next page shows a particular hearing that takes
14 place in Congress, you can see the date is July 26,
15 1957, is that correct?
16 A That's correct.
17 Q And the subject is false and misleading
18 advertising, filter tipped cigarettes?
19 A That's correct.
20 Q And if we go to the next page we can see who
21 testifies on this issue, that the acting -- back this
22 up a little.
23 On that date in 1957 a gentleman by the name
24 of the Robert T. Secrest, S-e-c-r-e-s-t, the acting
25 chairman of the Federal Trade Commission gives

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1 testimony, is that correct?
2 A That's correct.
3 Q And I'm not going to walk through those, you
4 can see he describes the history of what happens with
5 cigarette advertising for a page or two.
6 A I see that he does it, I've not had a chance
7 to read carefully what he says. I see that he does.
8 Q The fact that he does try to give a history
9 of what has happened --
10 A Yes.
11 Q -- I take it you don't doubt that the
12 chairman, or acting chairman of the Federal Trade
13 Commission back in 1957 probably knew what was
14 actually going on as far as cigarette advertising?

15 A I have no reason to doubt Acting Commissioner
16 Secrest's recital of the facts.

17 Q He would have more firsthand knowledge than
18 you do?

19 MR. FERGUSON: Objection, argumentative.

20 THE COURT: Overruled.

21 THE WITNESS: Yes, I was three years old at
22 the time, he would have more knowledge than I would
23 have.

24 BY MR. WEBB:

25 Q And he talks, he says he appreciates the
03516

1 opportunity to discuss with the committee the
2 commission's administration of laws regarding
3 cigarette advertising. See that?

4 A Yes.

5 Q Go to the point I want to get to, which is
6 what is going on in 1954. He says, to prevent
7 deceptive cigarette advertising wherever possible and
8 obtain its prompt discontinuance while scientific
9 research resolved the newly raised questions of
10 serious health hazards prompted the commission to
11 undertake an industry-wide unprecedented approach to
12 the problem. On September 14, 1954 the commission
13 directed its bureau of consultation to confer with the
14 producers of cigarettes for the purpose of adopting
15 standards for their advertising. Adherence to these
16 standards would, the commission believed, prevent
17 deceptive claims.

18 The bureau of consultation promptly sent a
19 letter to each cigarette manufacturer and enclosed a
20 suggested set of standards for consideration and
21 comment.

22 This was in 1954. The letter stated in part,
23 recent scientific developments with regard to the
24 effects of cigarette smoking have increased the
25 commission's interest in advertising claims made for
03517

1 such products and have increased its responsibility
2 under the law to prevent the use of false or
3 misleading claims. In our opinion, the scientific
4 developments referred to above have likewise increased
5 the responsibility of the industry to eliminate
6 voluntarily from its advertising all claims and
7 implications which are questionable in light of
8 present day scientific knowledge. It says, full
9 details were given to the press, wide publicity
10 followed, and then goes on to say, then ensuing
11 conferences were chaired by a representative of the
12 commission's bureau of consultation. Each was
13 attended by representatives of the cigarette
14 producers, I think a representative of the legal staff
15 of the commission's bureau of investigation and also
16 by a representative of the bureau's division of
17 scientific opinions.

18 The industry was advised to bring its
19 advertisements into conformance with the law expressed
20 in the original and subsequent revisions of the
21 suggested standards.

22 See that?

23 A Yes.

24 Q That's referring to these new guidelines?

25 A Yes.

03518

1 Q While the conferences were in progress -- I'm
2 sorry, with the law while the conferences were in
3 progress during this period the discontinuance of most
4 of the questionable advertising was obtained through
5 correspondence or personal contact with individual
6 companies. See that?

7 A Yes.

8 Q At least it would appear, based on what the
9 acting chairman of the Federal Trade Commission is
10 saying to Congress, that it was the action of the
11 Federal Trade Commission that stopped these ads and
12 not some collusive agreement that you put on this
13 chart, is that correct?

14 A No, I think that is incorrect.

15 Q Is that what he says?

16 A You have to read it very carefully, to be
17 very cautious about what the period that you are
18 talking about is. During this period, this period I
19 take it is the period subsequent to, following the
20 letter that was sent out in September of 1954, but if
21 you read the -- as I say, if you read Business Week or
22 Printer's Ink, which is an advertising trade journal
23 of the time, you will find that the advertising, that
24 the health advertising ended prior to that point.

25 Largely ended prior to that point.

03519

1 Q Actually he goes on to explain to Congress
2 exactly the advertisement that he is concerned about,
3 doesn't he?

4 A Does he? I've not had a chance to read this
5 document nearly in its totality, but I'm prepared to
6 look at it with you.

7 Q Let's go on and read what happened.

8 He says --

9 A Could we go on and read what happened?

10 Q We are.

11 The conference culminated in the commission's
12 adoption on September 15, 1955 of cigarette
13 advertising guides to use for its staff in evaluating
14 cigarette advertising, a copy of the guides were sent
15 to each cigarette producer together with requests that
16 he conform his advertising practices to guides
17 voluntarily. Facilities of the commission's bureau of
18 consultation to aid them were offered, the whole
19 procedure was fully publicized, the guides are
20 consistent with commission law and decisions that were
21 drafted after detailed consideration by
22 representatives of all commission's staff concerned
23 with the problem. They were approved by the
24 commission's general counsel, and were thoughtfully
25 considered by the commission prior to their adoption.

03520

1 He then says, prior to the adoption of the
2 guide typical cigarette filter claims involved health.
3 See that?

4 A Yes.

5 Q So at least the FTC believed that the type of
6 ad I showed you yesterday involved health, is that
7 what he says?

8 A Yes.

9 Q Do you agree he probably knows more than you
10 do about this subject matter?

11 MR. FERGUSON: Objection, argumentative.

12 THE COURT: Sustained.

13 BY MR. WEBB:

14 Q And prior to the adoption of the guides, the
15 typical filter claims involved health and extravagant
16 comparison with competing filters. See that?

17 A Yes.

18 Q Typical were these, maximum filtration,
19 effective filtration, superior filtering efficiency,
20 much less nicotine, the filter removes one-third of
21 the smoke, leaves all of the satisfaction, filters out
22 what you don't want in, gain a real assurance you can
23 only get with the greatest protection of a filter.

24 Some of those sound familiar, like what I
25 showed you yesterday?

03521

1 A Yes.

2 Q Filters -- just what the doctor ordered. No
3 other cigarette approaches such a degree of health
4 protection, and at the same time you will be enjoying
5 the greatest health protection in cigarette history.
6 That sound familiar?

7 A Those sound like health claims.

8 Q I showed you some of those ads yesterday?

9 A I couldn't -- I'll take your word for it, I'm
10 not sure whether we saw those.

11 Q Remember the ads said the greatest protection
12 ever in history?

13 A I can't recall the exact words of every one
14 of the ads you showed me. I'll take your word.

15 Q In health to your heart's content?

16 A I don't recall seeing that line yesterday but
17 I'll take your word for it.

18 Q I'm not saying every line, I'm saying did you
19 see ads like this yesterday?

20 A I'm trying to be clear, I saw some ads like
21 this and some things on the list I didn't see. I want
22 to be straight forward.

23 Q Guaranteed cleaner, milder, safer smoking.
24 These were standard advertising practices by the
25 cigarette companies prior to the issuance of these

03522

1 guides. See that?

2 A Yes.

3 Q Now --

4 A Go on a little bit in the document.

5 Q I am.

6 A Right where you were, I thought -- I haven't
7 read the whole thing, but I find it interesting but
8 then Mr. Blatnick, who is, I guess, the congressman
9 who oversaw the hearings --

10 Q Where are you?

11 A Right where -- just about where you finished.
12 Just at this point. Not to interrupt you, did you
13 discuss these individual claims, in short did the
14 tobacco representatives using these various claims
15 such as maximum filtration, effective, and so forth on
16 down the line, did they produce any testimony or
17 evidence to substantiate those claims. They attempted
18 in some cases and the commission was guided by what
19 they had from outside sources and by the guide in the
20 reading of the guides. I'll be glad to discuss them a
21 little later -- I'll slow down -- will show why these

22 things were taken out.

23 Mr. Blatnick. I would like to mention, Mr.
24 Commissioner, what puzzles me, and I say this with all
25 candor, the industry will spend millions of dollars

03523

1 with such statements but for some reason won't
2 voluntarily come to us, a free, responsible public
3 body in a public forum and tell us what is superior
4 about their filters or justify at least in some
5 measure the claims they are making before the entire
6 American audience here at great expense to themselves
7 in promotion of the filter tips.

8 And Mr. Secrest goes on to say I assume they
9 know more about their product than all of the other
10 people put together because they have their own
11 laboratories and they certainly know what is in their
12 own cigarettes. Some of it may be trade secrets,
13 undoubtedly is, but we operate within the current of
14 all knowledge we have and try to get all we can.

15 So the concern here is that these claims are
16 being made and the cigarette companies are unwilling
17 to tell the government, unwilling to tell the Federal
18 Trade Commission what they know about filters, smoking
19 and health.

20 Q Actually the chairman of the FTC said the
21 tobacco companies attempted in some cases to come in
22 and explain their substantiation? Did you read that
23 off?

24 A He says, in some cases, but then he also said
25 that then Mr. Blatnick said that the industry will

03524

1 spend millions of dollars but for some reason won't
2 voluntarily come before us and tell us what is
3 superior.

4 Q My question is, you agree that if the tobacco
5 companies were running ads and they stopped running
6 the ads because of what the Federal Trade Commission
7 was doing and not because of some agreement, that kind
8 of entries destroys your whole commission theory about
9 this arrangements, doesn't it?

10 A No, I disagree.

11 Q Next page. You at least agree that this man
12 from the FTC says that they are the ones that stopped
13 these health claims?

14 A No. As I read this, what the FTC said is
15 they put -- actually there was something else that you
16 read which I thought I might go back to.

17 Q Stick with this question a minute.

18 MR. FERGUSON: Your Honor, I object to this,
19 the witness is trying to answer.

20 THE COURT: I don't think there is a question
21 before him.

22 BY MR. WEBB:

23 Q I want to make the point as far as at least
24 what the chairman of the Federal Trade Commission is
25 saying, he is saying, he reads off the type of ads

03525

1 that were taking place then he says these were
2 standard advertising practices by cigarette companies
3 prior to the issuance of these guides. See that?

4 A Yes.

5 Q Then look at what he says on the next page.
6 Notwithstanding these difficulties, the adoption and

7 administration of the guides resulted in a marked
8 improvement in advertising of all cigarettes.
9 MR. FERGUSON: Excuse me. The witness is --
10 THE WITNESS: I don't know where you are, I'm
11 trying to follow on this.

12 BY MR. WEBB:

13 Q Page 278.

14 A Where on 278?

15 Q Right in the middle of the page starts with
16 the word notwithstanding.

17 A I'm with you, I want to read along with you.

18 Q Notwithstanding these difficulties, the
19 adoption and administration of the guide resulted in a
20 marked improvement in the advertising of all
21 cigarettes, including that of filter tipped
22 cigarettes. Prior to the issuance of the guide,
23 cigarette advertising generally involved health
24 claims. Since the issuance -- since their issuance,
25 the theme of all such advertising, including that for

03526

1 filter tips, centered around taste and flavor, prior
2 to and after the guides were adopted the bureau of
3 consultation obtained the voluntary discontinuance of
4 over 75 objectionable claims for industry products.
5 In the majority of those instances, the claims were
6 discontinued within a brief time after their first
7 appearance. See that?

8 A Yes.

9 Q My question is, at least the Federal Trade
10 Commission believes that it was their action that
11 stopped the health claims?

12 A Well, the Federal Trade Commission was not at
13 the Plaza Hotel meeting, so it might believe it really
14 had done something very strong here, not knowing that
15 in fact prior to its even starting this, the industry
16 had gotten together and decided to do this on its own,
17 and in fact the change in advertising, the timing of
18 the change in advertising and the trade press at the
19 time and so forth suggests that the industry had
20 already done that.

21 So the industry did this voluntarily and then
22 the trade commission comes in and says that we're
23 concerned that you are doing things that are
24 misleading, and the industry says okay, we'll stop,
25 but they have already agreed to stop.

03527

1 Q Do you agree that if it turns out that the
2 evidence establishes that the advertising changed not
3 because of some collusive arrangement but because of
4 pressure from the FTC, that clearly impacts your
5 opinions in this case, doesn't it?

6 MR. FERGUSON: Objection, repetitive.

7 THE COURT: Overruled.

8 THE WITNESS: If the evidence -- if the
9 evidence reveals that the only -- that the -- if the
10 evidence reveals that all of the changes in cigarette
11 advertising and all of the restraints on cigarette
12 advertising are the result of concerns about the
13 results of the actions of the FTC, then I would change
14 my opinion.

15 I think that as we go on through not just the
16 '50s, but '60s and '70s and '80s, we'll see that
17 that's not the case.

18 BY MR. WEBB:

19 Q You told the jury, when Mr. Ferguson was
20 asking you questions, that the tobacco companies began
21 to advertise based on taste and pleasure instead of
22 health, and that that was because of this arrangement.
23 Remember that testimony?

24 A Yes.

25 Q And look at what it said here. The Federal
03528

1 Trade Commission says, prior to the issuance of the
2 guides -- those are the guidelines that are passed,
3 right?

4 A Yes, the guides that -- hang on a second.
5 The guides that were for the use of the FTC staff in
6 cigarette advertisements, yes.

7 Q What he says is prior to the issuance of the
8 guides, cigarette advertising generally involved
9 health claims. Since their issuance, the theme of all
10 such advertising, including for filter tips, has
11 centered around taste and flavor.

12 A Yes.

13 Q At least the FTC believes that that change in
14 going to taste and flavor was because of the passage
15 of the guide. That's what it says here.

16 A That's what it says there. I'll repeat what
17 I said a minute ago, FTC people were not at the Plaza
18 Hotel and presumably were not aware of other things
19 going on in the industry behind their back, so to
20 speak. How could they have been expected to know that
21 prior to the issuance of their guides, the industry
22 had already met at the Plaza Hotel and agreed not to
23 do this?

24 Q They weren't there, but you weren't there and
25 --

03529

1 MR. FERGUSON: Argumentative.

2 MR. WEBB: Strike the question.

3 Q The guides they are talking about, if we
4 actually look at the guides that the FTC imposed upon
5 the tobacco companies, they are extraordinarily broad
6 and prohibit all health claims, do they not?

7 A First of all, I would not characterize the
8 guides as being imposed on the industry, the guides,
9 as the document says, were for the use of the FTC
10 staff in evaluating the cigarette advertisements and
11 that the industry was asked to voluntarily conform
12 with those guides.

13 Q And do you fault the tobacco companies from
14 voluntarily doing what the Federal Trade Commission
15 was asking them to do?

16 A I think that the industry had already agreed
17 to do what the Federal Trade Commission then came and
18 said we want you to do, and it sort of what is the big
19 deal, we have already decided to stop doing this, now
20 the Federal Trade Commission says don't do it, okay,
21 we won't.

22 Q What they asked them to stop the filter ads,
23 that actually happened after the Plaza Hotel meeting?

24 A They asked them to stop making health claims,
25 and I believe the industry already -- unsubstantiated

03530

1 health claims and I think the industry already agreed
2 not to make health claims, whether they could

3 substantiate them or not.
4 Q I put before the jury -- we'll not argue
5 about the guides, we'll look at them. Put before the
6 jury Defendants' Exhibit WX138.
7 Cigarette advertising guides FTC, September
8 22, 1955. These are the FTC guides that Chairman
9 Secrest was talking about in that last exhibit, is
10 that correct?
11 A I believe so.
12 Q See what they actually say?
13 They say to the tobacco companies, do they
14 not, that from here on out in ads that you run, no
15 representations, claims, illustration, or combination
16 thereof shall be made or used. They are talking about
17 making any representation or claim in ads, is that
18 correct?
19 A Yes, I believe so.
20 Q Shall be made or used which directly or
21 indirectly. See that?
22 A Yes.
23 Q That's pretty broad, directly or indirectly?
24 A Yes.
25 Q Refers to either the presence or absence of

03531

1 any physical effect or effects of cigarette smoking in
2 general or the smoking of any brand of cigarette. See
3 that?
4 A Yes.
5 Q Do you consider that to be pretty broad
6 language?
7 A Yes.
8 Q Because what that tells the tobacco companies
9 is from this day forward you could never again put any
10 ad or put into any ad any health claim at all.
11 A Is that a question?
12 Q Is that correct?
13 A No, I don't believe that's a correct
14 interpretation of how the advertising guides work.
15 Q No, I'm asking you what it says, I'm asking
16 you if you read what it says, reading the words on the
17 paper, the words say to the tobacco company from this
18 day forward you could never again write any
19 advertisement in which you make any health claim in
20 your ad, is that correct?
21 A No.
22 Q Can you tell me how you could make a health
23 claim in an ad without somehow referring directly or
24 indirectly to the physical effect of smoking on the
25 body?

03532

1 A It says that you should not, and as I
2 understand the way the cigarette advertising guides
3 work, and for that matter other of the FTC guides,
4 including FTC guides that I have personal experience
5 with, the guides are not the law, the guides are to
6 advise as it says this document is for the use of the
7 staff, the FTC staff in evaluating, in this case in
8 evaluating cigarette advertising.
9 This represents the -- this is a statement to
10 the industry that this is what the FTC thinks is
11 misleading and what it is prepared to challenge in
12 court, if necessary, if such an ad comes out. Firms
13 have the option to make the ad and take the FTC on in

14 court.

15 I've been on a case, I've worked on a merger
16 case -- there are merger guidelines as well, as part
17 of the same set of guidelines, and the FTC and the
18 justice department have a set of merger guidelines
19 which say in much the same way this is the way the
20 justice department and the FTC will approach a merger.
21 If it strays over certain bounds we believe we can win
22 a challenge and we will challenge that merger in
23 court.

24 Companies that intend to merge and the
25 mergers step over the limits of the merger guidelines

03533

1 are still free to go ahead and merge and take on the
2 FTC or justice department in court, and they sometimes
3 win, and I was a consultant, I was a witness for the
4 justice department in a case in which under the merger
5 guidelines and the Sherman Act they took -- there was
6 a merger between Archer Daniel Midland and Nabisco
7 that stepped over the line, Archer Daniel Midland and
8 Nabisco went ahead and merged anyway. The justice
9 department took them to court and they won the case,
10 wrongly perhaps, but they did lose the case.

11 My understanding of the way these things work
12 is that they are a statement of the FTC's position on
13 what kinds of cases it feels it's going to take to
14 court and firms are free to take the FTC on if it
15 believes it can win, or not, if it thinks that it
16 can't win. My understanding from reading the
17 documents is that executives in the industry
18 understood that as well.

19 Q Are you finished?

20 A Yes.

21 Q Would you mind answering the question?

22 A I thought I just did.

23 Q Your experience with mergers we find very
24 interesting. I asked a very simple question, If you
25 can't answer, tell me.

03534

1 I'm asking you whether, if we read the
2 English language on this piece of paper -- I think you
3 understood.

4 Is there some reason why you don't want to
5 answer my question?

6 A No. What I'm concerned about is that the
7 English language on this piece of paper is a very
8 limited part of the English language that surrounds
9 the cigarette advertising guidelines and all of the
10 other FTC guidelines.

11 Q We'll go through the entire FTC regulation,
12 don't worry about it, we'll take it one step at a
13 time.

14 When these guidelines came out in 1955, if
15 you read what they say, if you read what they say,
16 what they say right on their face is that from that
17 day forward the tobacco companies would not be allowed
18 to run any ad that had any health claim in it, is that
19 correct?

20 A If you read the English, specifically it says
21 they should not, not they cannot or must not or will
22 not, but they should not.

23 Q They are being told by the regulator he
24 should not do this, is that correct?

25 A That's correct.

03535

1 Q Do you think there is anything wrong with the
2 tobacco company following the mandate or dictate of
3 the body that regulates cigarette advertising, is that
4 somehow an antitrust violation?

5 Strike the question.

6 If the tobacco companies follow what the
7 Federal Trade Commission tells them they should do, is
8 that an anti-competitive act?

9 A Not in and of itself, no.

10 Q Thank you.

11 Now, in fact, the actual purpose of these
12 guides is to tell the tobacco companies what they need
13 to do to avoid deceptive and misleading advertising,
14 is that correct?

15 A That's correct.

16 Q And so the FTC --

17 A Actually let me back off from that. It's to
18 tell the tobacco companies what they should do in
19 order to avoid being charged by the FTC with deceptive
20 advertising, ultimately it would be up to the legal
21 system to decide. Just because the FTC charges
22 someone with deceptive advertising doesn't mean they
23 always win. What it says to the cigarette companies
24 is this is what you should do to avoid being charged
25 with deceptive advertising then it would, the legal

03536

1 process, if they decide to make a claim and the FTC
2 decides to charge them, it would be up to a legal
3 process, a court process to determine whether, in fact,
4 they would be allowed to make the claim or whether
5 they would have to retract the claim, that's my
6 understanding.

7 Q Should these tobacco companies have had to
8 run ads that they knew would result in suits from the
9 Federal Trade Commission or else if they don't run the
10 ads under your theory they are engaged in
11 anti-competitive conduct?

12 A I think the companies are always free to
13 approach the Federal Trade Commission. Liggett &
14 Myers was about to approach the Federal Trade
15 Commission and ask about the ads that it was going to
16 run for the XA product, the safer cigarette that it
17 was trying to develop in the 1970s, they are free to
18 approach them. There is actually -- I'm trying to
19 remember which company president it was, but at least
20 one company president said basically we can run the
21 ads we want and fight them out and if we're making a
22 truthful claim, I think we can win.

23 Q If companies decide that they should follow
24 what the FTC told them they should not do, that is not
25 do anti-competitive acts, is it?

03537

1 A No.

2 Q If we go down further there is another
3 guideline, number three, that makes it clearer that
4 from this day forward that these companies should not
5 run any health ads, is that correct?

6 A I'll.

7 Q Read it off, says any ad which refers to the
8 effect or effects of cigarette smoking in general or
9 the smoking of any brand of cigarette on the nose, the

10 throat, the larynx or other part of the respiratory
11 tract, digestive system, nerves and then any other part
12 of body or energy. See that?

13 A Yes.

14 Q You would at least agree that's pretty broad
15 language, is it not?

16 A Yes.

17 Q Now, there is another paragraph?

18 A Go back, look at number two.

19 Q That's where I'm going now. Look at number
20 two because number two actually relates to a specific
21 issue which is advertising or referring to tar and
22 nicotine levels, is that correct?

23 A That's correct.

24 Q Read that to the jury. Paragraph two says
25 that in an ad you cannot represent that any brand of

03538

1 cigarettes or the smoke therefrom is low in nicotine
2 or tars or contains less nicotine, tars, acids, resins
3 or other substances by virtue of its ingredients,
4 method of manufacture, link, added filter or any other
5 reason or without any assigned reason than any other
6 brand or brands of cigarettes when it has not been
7 established by competent scientific proof applicable
8 at the time of dissemination that the claim is true
9 and if true that such difference or differences are
10 significant. See that?

11 A Yes.

12 Q Under that paragraph the FTC told the tobacco
13 companies that if you had, if you had scientific proof
14 -- if you did have and you could prove it they would
15 consider that in allowing you to run this type of ad.
16 See that?

17 A Yes.

18 Q What is interesting, though, is they did not
19 put that in, if you will, that exception in paragraph
20 one, did they?

21 A No.

22 Q And they didn't put it in paragraph three,
23 did they?

24 A No.

25 Q What they did say is these guides will be,

03539

1 not may be, but says will be altered, modified, or
2 otherwise amended when and if facts and circumstances
3 warrant. See that?

4 A Yes.

5 Q If we go back to paragraph one and we see
6 that paragraph says that you can't make any reference
7 to any physical effects at all?

8 A Says should not.

9 Q Should not, should not?

10 A Right.

11 Q That paragraph has never been amended or
12 altered by the Federal Trade Commission from the day
13 it was passed until today as I stand here, is that
14 correct?

15 A That's my understanding.

16 Q And the other paragraph, paragraph three
17 which refers to the effects or effect of cigarette
18 smoking on, among other things, any other part of the
19 body.

20 That paragraph does not contain that

21 exception about scientific proof, does it?
22 A No.
23 Q And that paragraph, as I stand here, has never
24 been amended or modified by the Federal Trade
25 Commission, is that correct?

03540

1 A That's my understanding.
2 Could I look at that number two again for a
3 second?
4 Q Sure can, number two.
5 A So the types of ads that you showed us
6 yesterday which suggested an added filter lowers tar
7 and nicotine, those sorts of ads you showed us
8 yesterday and said were health claims would, in fact,
9 be permissible if there was scientific proof has
10 showed in fact the filter did lower tar and nicotine,
11 those types of ads would, in fact, be permissible, is
12 that my understanding?
13 Q That's correct, let's talk about that.
14 MR. FERGUSON: May I ask if Mr. Webb could
15 hand the witness a copy of the guide, I think he is
16 having trouble with the screen.

17 BY MR. WEBB:

18 Q Is the screen next to you easier to read?
19 A I'm not comfortable with that.
20 Q I'll hand that to you, Mr. Ferguson, so there
21 it no question you can see what is there.
22 A I wanted to clarify that fact.
23 Q Go to that point.
24 A Okay.
25 Q That point which is that if at this time in

03541

1 1955, if a cigarette company could prove, first of all,
2 that the claim is true, that would mean -- let's say
3 that you said that it was low in tar.
4 Are you with me?
5 A Yes.
6 Q You would have to, first of all, prove it was
7 low in tar, is that correct?
8 A To make it a truthful claim you need to show
9 that, yes.
10 Q Then you would have to prove that the
11 difference or differences are significant?
12 A Yes.
13 Q Meaning, I guess, as I read that, meaning
14 that you have to prove that a cigarette low in tar had
15 some health benefit?
16 A That's one interpretation, another
17 interpretation is that it's a significant difference
18 in tar level, the difference between 1.2 and 1.1 is an
19 important difference or could just be a trivial
20 difference.
21 Q Let's see what happened after these guides
22 were passed.
23 A Okay.
24 Q Now --
25 A By the way, are guides passed? Did somebody

03542

1 vote on the guides?
2 Q I'll use the word they were implemented by
3 the Federal Trade Commission.
4 A Adopted, maybe adopted is a good word.
5 Q The chairman told congress how all of the

6 staff had considered these guides, do you remember?
7 A I think maybe adopted by the Federal Trade
8 Commission is -- when you said passed, I thought maybe
9 somebody voted on it and I wasn't aware of that.
10 Q Were they adopted by the Federal Trade
11 Commission, is that your understanding?
12 A Yes.
13 Q Does that mean they are not part of the
14 Federal Trade Commission?
15 A No. I'm sorry, I didn't mean to quibble. I
16 heard you say they were passed, in my mind that means
17 somebody like congress voted on them, and I didn't
18 think that was the case.
19 Q I guess to be adopted by the Federal Trade
20 Commission.
21 A That's fine. I'm sorry, I don't mean to
22 quibble.
23 Q In order for the guides to be adopted by the
24 Federal Trade Commission does that mean the members of
25 Federal Trade Commission have to vote to adopt them?
03543

1 A I don't know.
2 Q How else would they be adopted?
3 A Presumably there is some procedure.
4 Q Let's move on.
5 A Yes.
6 Q When you -- by the way -- strike the
7 question.
8 Am I correct that what you have seen from the
9 evidence is that after these guides were passed, that
10 there was a period of time from approximately 1955 to
11 1957 where the cigarette companies in their
12 advertising did not make any implied or direct health
13 claims about filters but they simply ran ads that
14 explained how the filter was constructed or its
15 physical properties, is that correct?
16 A As a general proposition although
17 occasionally health ads came out and were dealt with
18 by the industry.
19 Q I'll show you a document that is in evidence
20 I'll give you a copy of it, easier for you to read.
21 As we trace the history of what actually
22 happened with the Federal Trade Commission over the
23 next decade -- I'll hand you a document that is in
24 evidence, it's actually I guess Washington Exhibit
25 6112 in evidence and I should ask in preparing your
03544

1 testimony did you review the documents that I just
2 gave you?
3 A Yes, I've read this document.
4 Q Show the jury what this document is.
5 This is a document from the Federal Trade
6 Commission, is that correct?
7 A Yes, it's a working paper of the Federal
8 Trade Commission.
9 Q So the jury can see, this is actually
10 prepared by the bureau of consultation, Federal Trade
11 Commission, wasn't it? See that?
12 A Yes.
13 Q What it is is that it's a document -- you say
14 it's called a working paper?
15 A Working paper, yes.
16 Q And it actually is on the subject we're

17 talking about, is that correct, cigarette advertising,
18 health information, and regulation before 1970?
19 A Yes.
20 Q And it's by John E. Calfee. See that?
21 A Yes.
22 Q Is he an economist?
23 A That's my understanding.
24 Q Do you know him?
25 A I didn't know him, was not aware of Dr.

03545

1 Calfee before I read this. I take that back, I think
2 I read a reference to this piece of research in Mike
3 Scheer, and I can't remember Ross's first name, but in
4 Scheer and Ross and so I was -- seen a reference to it
5 then I read it in my preparation, sure.
6 Q And so what this -- go to the next page, not
7 going through the whole document, it's a pretty thick
8 document, is that correct?
9 A Not as thick as the surgeon general's report
10 but it's runs 75 pages -- 77 pages including
11 references, yes.
12 Q Does a pretty detailed analysis of what was
13 actually going on back in the 1950s and '60s as far as
14 cigarette advertising, does it not?
15 A Gives a pretty good detail analysis of Mr.
16 Calfee's opinion about what was going on in the
17 cigarette advertising period before 1950.
18 Q Mr. Calfee worked for the Federal Trade
19 Commission, is that correct?
20 A Yes, that is my understanding.
21 Q Have you ever worked for the Federal Trade
22 Commission?
23 A No.
24 Q This is dated December 1985, is that correct?
25 A Yes.

03546

1 Q And he describes in this book what was going
2 on after these guidelines passed, is that correct?
3 A It's not a book exactly.
4 Q I'm sorry, the working paper. In the
5 document you have in your hand called the working
6 paper, does he describe in that document what was
7 going on between 1955 and 1957 in connection with what
8 the cigarette companies were doing with their
9 advertising after the guides were passed?
10 A Before and after, yes.
11 Q And I think the page I'll direct your
12 attention --
13 A For example --
14 Q No question pending.
15 A Okay.
16 Q Call your attention --
17 MR. FERGUSON: I believe he was completing
18 his answer.
19 THE COURT: No, I don't think there was a
20 question pending.
21 THE WITNESS: Fine, I'll withdraw the
22 response.
23 BY MR. WEBB:
24 Q Go to page 32.
25 A Okay.

03547

1 Q What I was going to call your attention to

2 now is at the bottom of page 32 you see where I
3 actually put another yellow -- says under the FTC
4 guides. See that?
5 A Yes.
6 Q Under the FTC guides. That is referring to
7 the document we just showed the jury, is that correct?
8 A Yes.
9 Q Under the FTC guides, sellers -- that's
10 referring to tobacco companies?
11 A Yes.
12 Q He says could advertise the existence of a
13 filter or the construction of the filter or the
14 appearance of the number of tiny traps it contained or
15 especially the taste of the smoke that passed through,
16 but could not advertise the filter's effectiveness.
17 See that?
18 Based on your review of the evidence, is that
19 in fact what the tobacco companies actually did during
20 that time period?

21 A During time period '55 to '57?

22 Q Yes.

23 A Yes.

24 Q Then if we go back and trace cigarette
25 advertising, what we find is that a new time period

03548

1 that at least seems to be marked in the literature is
2 the time period from 1957 to 1959 which has been
3 referred to.

4 Have you seen in the literature as the tar
5 derby?

6 A Yes, I've seen that.

7 Q Let's tell the jury what the tar derby is and
8 we'll -- I want to -- we'll come back to this book but
9 I want to explain to the jury, if I might, what the tar
10 derby is and --

11 A Was.

12 Q Was. It's passed. 30 years ago, is that
13 correct?

14 A The first, yes.

15 Q 40 years?

16 A Tar derby was '57 to '59 according to Mr.
17 Calfee.

18 Q Tell the jury what that is, what the term
19 referred to was the fact that around 1957 more
20 sophisticated and technological ways to measure tar
21 and nicotine were developed, is that correct?

22 A I'm not sure. Point me to something, I'm not
23 sure about the science of measurement, the development
24 of the techniques for measurement.

25 Q Just to help refresh your memory, let's go

03549

1 through what Dr. Calfee said happened, would that be
2 easier?

3 A Yes.

4 Q Page 33?

5 A Okay.

6 Q Dr. Calfee describes this period of time he
7 put the heading, 1957 to 1959, the great tar derby.
8 See that?

9 A Yes.

10 Q He said it is a little appreciated fact that
11 perhaps half the improvements in cigarette content
12 during the past 30 years occurred in the brief period

13 from 1957 -- I'll go to the next page -- to 1960. See
14 that?

15 A Yes.

16 Q He goes on to describe those factors.
17 Have you read this before?

18 A Yes, several times. He goes on to describe
19 that by 1957 epidemiological studies of smoking and
20 cancer continued to appear.

21 Q Call your attention to the part I want to
22 call your attention to, I'm trying to move it along.

23 A Sorry.

24 Q He goes on to describe what happened in the
25 market. The point I'm getting to is about these

03550

1 measurements, he says market reaction was swift. Tar
2 and nicotine -- we're still talking about the same
3 time period, 1957 to 1959, is that correct?

4 Page 34 now.

5 A Mine is stapled.

6 Q I'll slow down. I'm on page 35, the last
7 paragraph.

8 A Okay. I want to find out what the swift
9 market reaction was to.

10 Q Read anything you want to.

11 A Okay.

12 Q The point I want to call to your attention is
13 market reaction was swift, talking about the time
14 period 1957 to 1959, at least that is under the
15 heading?

16 A That's correct.

17 Q Tar and nicotine measurements began to be
18 published regularly by Consumer Reports and Reader's
19 Digest brand by brand, progress was duly registered
20 and applauded. Many sellers of lower tar and nicotine
21 brands advertised accordingly.

22 Consumer's Union predictably objected to any
23 advertising use of its figures.

24 Kent the most successful -- I'm sorry, Kent,
25 the most successful of the low tar brands improved its

03551

1 filters in 1957 and advertised significantly less tar
2 and nicotine than any other filter brand, occasionally
3 using bar graphs in its print ads. See that?

4 A Yes.

5 Q When Kent began to do that, under your theory
6 of this case Kent should not be doing that because
7 they were part -- Kent is made by Lorillard and they
8 are somehow part of an arrangement that was entered
9 into back in 1953?

10 A Kent has -- Lorillard, not quite at much as
11 Liggett, but like Liggett, has been a bit of a
12 maverick in this industry. As we'll see later on,
13 Lorillard actually pulled out briefly of the
14 conspiracy because it felt the rest of the firms were
15 not giving it a chance to win, it thought, had it had
16 a better product. Yes, they were pushing the limits,
17 they were cheating on the conspiracy a bit.

18 Q Was everyone cheating by this time?

19 A No, I think Lorillard particularly cheated on
20 the agreement.

21 Q By the way, every time you say they are
22 cheating, is that also evidence that there wasn't an
23 agreement in the first place?

24 A If there were no other evidence of the
25 agreement, then it would suggest that there were no

03552

1 agreement in the first place, but there is lots of
2 other evidence about the agreement.

3 Q According to this economist that works for
4 the Federal Trade Commission, he goes on to say it
5 wasn't just Kent doing this?

6 A Yes, there was certainly some tar and
7 nicotine advertising during this time period.

8 Q Tar and nicotine advertising quickly
9 proliferated?

10 A Yes.

11 Q Today's Marlboro, 22 percent less tar, 34
12 percent less nicotine, less tar and nicotine.
13 Parliament, 1958, lowest tar of all low tar
14 cigarettes. Duke, 1959?

15 A Yes.

16 Q Duke, you know who manufactures Duke?

17 A No, I don't know that brand.

18 Q Is that American Tobacco Company, if you
19 know?

20 A I'll take your word for it.

21 Q Don't take my word, I'm not sure.

22 Do you know?

23 A I don't know. I think Buck Duke was the head
24 of the American Tobacco Company. It's a good bet, I
25 could be wrong, I don't know.

03553

1 Q I'm not sure. I asked, if you don't know,
2 we'll leave.

3 You don't know?

4 A I don't know for certain who made Duke
5 cigarettes.

6 Q But he says many others. See that?

7 A Yes.

8 Q Now, as fast as cigarettes were reformulated
9 I take it that almost everyone, according to you, must
10 be cheating by this point?

11 A There was an outbreak of advertising on the
12 basis of tar and nicotine. Whether health claims were
13 being made is another matter.

14 By the way, these are -- I took you to say a
15 minute ago that the FTC said that this sort of
16 advertising was illegal under paragraph two of that
17 cigarette advertising guide.

18 Q We'll go on and read and find out what
19 happened. Dr. Calfee tells us what happened?

20 A Dr. Calfee says at the bottom of page 36,
21 I've not been able to discover much about the FTC's
22 attitude toward this advertising of 1957 to 1959. The
23 1957 Congressional hearing that strongly
24 criticized the FTC for not challenging the cigarette
25 advertising then taking place which at that point said

03554

1 little about comparative filtration.

2 Q We'll go through that.

3 A Okay.

4 Q I'll --

5 A I'm sorry, you said you were going to tell us
6 exactly what happened. He said he really doesn't know
7 much about their attitude.

8 Q We'll go through it line by line so the jury

9 will see what Economist Calfee understood the
10 situation.

11 You're not suggesting to the jury when Philip
12 Morris started advertising today's Marlboro 22 percent
13 less tar, 34 percent less nicotine, that is clearly a
14 health claim, is it not, attempting to appeal to the
15 health conscious people that want a lower tar
16 cigarette?

17 A Certainly an appeal to people who want a low
18 tar cigarette. Whether it explains the health
19 consequence of consuming a lower tar cigarette or not,
20 that's left up to the reader of the ad to understand.

21 Q Why else would you put into an ad -- strike
22 the question.

23 Dr. Calfee goes on to say as fast as
24 cigarettes were formulated, ads appeared with the new
25 result as the Old Gold advertisement said dramatically

03555

1 reduced in tar and nicotine and have the pleasure of
2 20 cigarettes and get as little tar and nicotine as in
3 15 of the previous brands. See that?

4 A Yes.

5 Q He goes on to say there was virtually none of
6 the fear advertising of the 1950s. However -- I'm
7 sorry, misread there was virtually none of the fear
8 advertising of the early 1950s, however, semicolon --

9 A Yes.

10 Q -- that had been eliminated permanently by
11 the 1955 guide. See that?

12 A Yes.

13 Q That's what Economist Calfee when he was --

14 A My understanding is that Economist Calfee was
15 not privy to the documents when he wrote this in 1985
16 that I had been able to see about the meeting. When I
17 read this, I wondered what was going on and went
18 carefully through the timing. As I've tried to
19 explain to the jury, I believe Mr. Calfee was not
20 aware when he wrote this in 1985 of the meeting at the
21 Plaza Hotel where the agreement was reached so he is
22 attributing it to the 1955 guides. I think if you
23 read the timing in Mr. Calfee's article it suggests
24 there is -- doesn't suggest, states quite clearly
25 there is a puzzle, states quite clearly, Mr. Calfee

03556

1 says that this advertising had been eliminated even
2 before the guides came out.

3 He is the one -- it was because of his
4 article that I found the September 24 and June 19
5 business press things. So I don't think he knew about
6 the meeting but it was his opinion that the it was
7 eliminated by the guides, I'll certainly agree with
8 that.

9 Q Now, he says that the FTC apparently
10 tolerated the simple advertising of tar and nicotine
11 content because the numbers were now scientifically
12 based, but he footnotes that, is that correct?

13 A Yes.

14 Q Footnotes down -- footnote 136, he says I've
15 not been able to discover much about the FTC's
16 attitude toward the advertising of 1957 to 1959. The
17 1957 congressional hearing had strongly criticized the
18 FTC for not challenging filter cigarette advertising
19 when taking place, which at that point said little

20 about comparative filtration. See Advertisers
21 Magazine, Printers Ink, et cetera, indicated that the
22 commission had felt satisfied with the --

23 A Before you go on, my copy has a -- was
24 photocopied with a post it note that says stop right
25 in the middle. The footnote I can't read along with

03557

1 you.

2 Q Where did you leave off?

3 A I got to the end of page 36 and I'm trying to
4 read in the footnote but on my copy --

5 Q Are you on page 37?

6 A Yes, but has a big white square in the
7 middle of it and says stop.

8 Q I'll get you another copy.

9 A Thank you.

10 Q Let's see if you can read this part.

11 A I'll try.

12 Q It says -- finish the footnote, says --

13 MR. FERGUSON: My copy doesn't have a post
14 it.

15 MR. WEBB: Thank you.

16 Q Are you with me now?

17 A Yes, thank you.

18 Q With the accuracy of the measurements being
19 advertised. Goes on to describe -- well, finish the
20 footnote, 1950-51 orders against Reynolds, American
21 Tobacco, and Lorillard were of limited power to prevent
22 tar and nicotine advertising because they were
23 brand-specific. Recall that when the companies were
24 issued -- I recall that when the complaints were
25 issued in the early 1940's most cigarette

03558

1 manufacturers were one-brand companies. Reynolds and
2 American Tobacco never engaged in significant tar and
3 nicotine advertising but, of course, Lorillard did for
4 Kent which had not existed at the time the orders were
5 entered.

6 As just noted, Lorillard also advertised tar
7 and nicotine content for Old Gold which was covered by
8 the order in FTC versus Lorillard and in 1959
9 Lorillard was held in contempt of that court order.
10 See that?

11 A Yes.

12 Q If we go back up to the article -- I want
13 to finish what Dr. Calfee said. He said that the FTC
14 apparently tolerated the simple advertising of tar and
15 nicotine content because the numbers were now
16 scientifically vague?

17 A Apparently.

18 Q Pardon?

19 A Apparently, said they apparently tolerated
20 for that reason.

21 Q Did I leave out the word apparently?

22 A Yes.

23 Q Is that what it says?

24 A Yes.

25 Q Consumer's Union and Reader's Digest used

03559

1 well-established laboratories. The major cigarette
2 manufacturers had their own laboratories using similar
3 or even improved methods and these companies sometimes
4 validated their figures with the same laboratory

5 employed by Reader's Digest or relied upon numbers
6 published in Consumer Report. See that?

7 A Yes.

8 Q I want to show you now some of the actual ads
9 that ran during this time period.

10 A Okay.

11 Q Did you -- I'll start with this question,
12 maybe we can shortcut this.

13 Did you see a number of the companies that
14 you alleged were part of this arrangement not to
15 advertise on the basis of health, did you see ads that
16 they ran during this tar derby time period, 1957 to
17 1959.

18 Were some of these companies running filter
19 ads that were clearly health claims?

20 A Again, we need a definition of health claim I
21 believe that they were running ads in which they
22 listed tar and nicotine levels. I don't believe there
23 were ads that said, that explained to the consumer why
24 they should be concerned about tar and nicotine or why
25 the medical community was concerned about tar and
03560

1 nicotine or why smoking a cigarette that was lower in
2 tar and nicotine would be good for you, there was
3 apparently during late 1950s a period of time in which
4 cigarette companies ran ads in which they explained
5 what their tar and nicotine levels were as they were
6 measuring them at the time and this is the same period
7 of time at which U.S. Tobacco sent a similar
8 advertisement to the medical community, to doctors,
9 and was called on the carpet by Philip Morris.

10 Q My question is did you see any ads that ran
11 during this 1957 to 1959 time period that are
12 inconsistent with your theory that these companies
13 were not making health claims?

14 A That were inconsistent? I believe that the
15 nature of health advertising in this industry changed
16 dramatically in the '60s as a result of this agreement
17 and that there were ads that listed tar and nicotine
18 numbers but that didn't tell the story about why a
19 consumer should care about that or why low tar was
20 healthier.

21 Q Look at some of the ads, I'll show you what
22 is marked as WX172 which is an ad that ran in Seattle
23 Times, October 1, 1957?

24 A Okay.

25 Q Actually to show you the date, I'll show you
03561

1 the date at the top.

2 Can you see that date?

3 A Yes.

4 Q See what this ad was saying. It says Kent
5 filters that. See that?

6 A Yes.

7 Q By the way, do you view that to be a Kent
8 claim in that its filters are better than other filter
9 cigarettes?

10 A Best somehow.

11 Q Best of all leading filter cigarettes?

12 A Yes, that's best somehow, yes.

13 Q Best of all here is the question?

14 A Best for flavor, best for health, best for
15 sexiness, it says best. According to some dimension

16 it's best.
17 Q Go on, see what it says?
18 A Okay. Best means best of all, yes.
19 Q It says with every puff with every pack you
20 get definitely less tar and nicotine in Kent than in
21 any leading filter brand you now smoke. See that?
22 A Yes.
23 Q When a company tells the consumer that you
24 get less tar and nicotine in my product than in any
25 other leading filter brand, are you telling this jury

03562

1 that that's not a direct or indirect health claim?
2 A I think it's at the very best an indirect
3 health claim. It doesn't tell the consumer why they
4 should be concerned about tar and nicotine, so it's
5 left up to the reader to infer that tar and nicotine
6 is better for you compared to the sort of advertising
7 that went on in the 50s when they said takes the fear
8 out of smoking, I believe that was a Philip Morris
9 advertisement, or it's better for you or for health
10 production that is a stronger claim.

11 This is -- as I said, we need a definition of
12 what constitutes a health claim. This is an indirect,
13 at best, health claim.

14 Q The reason I'm asking is you're aware the
15 1955 guides have now been placed by the Federal Trade
16 Commission, is that correct?

17 A Yes.

18 Q Which says we're not supposed to be
19 advertising the physical effects of smoking?

20 A Yes.

21 Q So did it look to you --

22 A If you can -- well, yes. I'm sorry.

23 Q Does it not appear to you that Lorillard is
24 trying to do everything it can to stay within the
25 guidelines but still try to promote its product in

03563

1 comparison to other companies's products?

2 A Or to do everything it can within the
3 agreement and still promote its products when compared
4 to other companies's products, yes, are consistent.

5 THE COURT: Let's take the morning recess.

6 (At this time a short break was taken.)

7 THE COURT: Please sit down. By the way,
8 ladies and gentlemen, we will have a bit of an early
9 break today because of scheduling issues. We will
10 probably be breaking for the day, and I guess from
11 your standpoint for the weekend, about 2:20 this
12 afternoon.

13 MR. WEBB: May I proceed, your Honor? Thank
14 you.

15 BY MR. WEBB:

16 Q Actually, Doctor, I guess we left off I was
17 showing you some ads that had run during the 1958 --
18 1957, 1958 time period, asking you questions as to
19 whether these ads showed competition in advertising
20 health claims that are inconsistent with your theory
21 of collusion.

22 Do you recall those questions?

23 A I recall the questions, yes.

24 Q And I am going to show you a couple more ads.
25 This actually is Life magazine. That is actually not

03564

1 FDR. It is Ralph Bellamy, pretending to be FDR. But
2 it is dated February 10th, 1958. And the ad I would
3 like to show you is actually an ad by my client,
4 Philip Morris, for Parliament.

5 JUROR: Counsel, were these exhibits already
6 given to us, the numbers?

7 MR. WEBB: They were. I will give them to
8 you one at a time. This is Exhibit Number WX1777.

9 BY MR. WEBB:

10 Q Do you see, this is an ad for Parliament, do
11 you see that, Doctor?

12 A Yes.

13 Q And you understand Parliament was
14 manufactured by Philip Morris?

15 A I will take your word for it. Who makes the
16 various brands as a broad thing, I have a hard time
17 keeping track of that. I will take your word for
18 that.

19 Q That's fine. Now, this ad shows Philip
20 Morris advertising Parliament as the first filter
21 cigarette in the world that meets the standards of
22 United States Testing Company. New hi-fi, high
23 filtration, filter, Parliament.

24 Do you see that, sir?

25 A Yes.

03565

1 Q We go down to the smaller language. Let's
2 see what Philip Morris says. It says over 30,000
3 traps, the most effective filtering material,
4 millimeter for millimeter in a cigarette today. No
5 other popular filter cigarette delivers less tar and
6 nicotine.

7 Now, Doctor, when Philip Morris said that, do
8 you believe Philip Morris was trying to appeal to the
9 health conscious segment of the market?

10 A I think it is reasonable to say that a reader
11 of that ad might draw an implication that this was a
12 healthier product, yes.

13 Q And Philip Morris -- which Philip Morris is
14 not supposed to be doing this under your theory, under
15 the collusion they entered into back here in 1953
16 Philip Morris should not be competing on the basis of
17 health claims?

18 A I think as a general matter they shouldn't be
19 competing on the basis of health claims. I would
20 characterize this as a fairly weak health claim. It
21 leaves a lot for the consumer to infer. But, yes, I
22 think as a general matter, this would not be the sort
23 of advertising that Philip Morris would like to see
24 going on, under my theory.

25 Q Is it possible the reason this is going on is

03566

1 that your theory is wrong?

2 A No, I don't think that is true. I think
3 there is just too much other evidence in this time
4 period and other time periods that make it quite clear
5 there were health claims that the industry could make
6 and chose not to as a result of the agreement.

7 Q By the way, we are going to get there in a
8 minute, but the truth is you discovered that even this
9 claim -- you call it -- weak as it is, the Federal
10 Trade Commission came down on top of Philip Morris's
11 head and the other companies and told them you can't

12 even say this? Isn't that what happened?
13 A Not according to what Dr. Calfee said, I
14 thought a second ago.
15 Q This is 1958?
16 A Right.
17 Q This is during the tar derby?
18 A Right. My understanding during the tar derby
19 this sort of advertising went on, the FTC basically
20 allowed it to go on.
21 Q Doctor, listen to my question. Isn't this
22 the type of ad that in 1960 -- because these ads ran
23 for a couple of years the Federal Trade Commission
24 came to the tobacco companies and said stop those ads,
25 those are health claims.

03567

1 A Actually I think in 1960 the industry
2 negotiated an agreement with the FTC in which
3 eventually all the companies were induced to sign on.
4 They all got together and agreed that they would stop
5 doing this -- even this sort of health claim, with the
6 FTC's help, yes.
7 Q We will get to that in a minute. So we will
8 tell the jury the full picture of what happened. You
9 believe this is a health claim, but it is weak?
10 A I would say it is fair to say that some
11 consumers might infer from that there is a health
12 benefit to them. It is fairly -- I would characterize
13 it as a weak health claim.
14 Q You don't think Philip Morris is trying to
15 compete against other companies, when it says the new
16 hi-fi filter with the exclusive recessed design offers
17 you the most complete filtering action in cigarette
18 history?
19 A And the flavor story is simple, it goes on to
20 say. And the flavor story is simple. Filtering for
21 flavoring, filtering for health. It says it is the
22 most complete filter.
23 Q Doctor, they just told us, no other popular
24 cigarette delivers less nicotine and tar?
25 A Yes. I'm sorry. I agree, low tar and

03568

1 nicotine statement, I think is a weak health claim.
2 Q Let's go on to another company that I guess
3 was part of the cartel. That's the term, cartel?
4 A I'm happy with that term, sure.
5 Q This also is Life magazine. Let's see what
6 the date is. This is July 14th, 1958. This is during
7 the tar derby, is that correct?
8 A Yes.
9 Q The tar derby, by the way, is a term that has
10 been used by historians to describe this period of
11 time when the tobacco companies were aggressively
12 competing against each other and making claims about
13 their low tar cigarettes, is that correct?
14 A That is time period in which the industry was
15 advertising tar and nicotine ratings and using that as
16 an advertising claim, that's correct.
17 Q This one is a cigarette called Hit Parade. I
18 can tell you -- it actually says, it says it is the
19 American Tobacco Company.
20 Do you see that?
21 A Okay. Yes.
22 Q So this is -- this is one of the people that

23 entered into the collusive agreement, according to
24 your theory?

25 A That's correct.

03569

1 JUROR: Can I have the exhibit number?

2 MR. WEBB: My fault. WX173.

3 BY MR. WEBB:

4 Q This is the American Tobacco Company
5 advertising a cigarette called Hit Parade. Let me
6 back this up a little bit. Only -- by the way, the
7 yellow is my markings, just so you know that is not in
8 the ad, I put that on here.

9 Only one cigarette can filter best.
10 According to the new and superior method of testing
11 for filtration that cigarette is Hit Parade.

12 Do you see that?

13 A Yes.

14 Q And it goes on down here, so there can be no
15 doubt about comparison advertising, it says, new proof
16 Hit Parade filters best of all leading filter
17 cigarettes.

18 I think I need to get in a little closer
19 because otherwise you are not going to see.

20 It says the latest method of testing that
21 traps and weighs total smoke solids -- by solids are
22 tars, is that correct, sir?

23 A You would have to ask a scientist. I'm not
24 sure what they meant when they said solids. That's a
25 reasonable inference, I guess.

03570

1 Q The total smoke solids that ordinarily would
2 reach the smoker's mouth, here is the most recent
3 report based on analysis by Froehling and Robertson,
4 Inc., one of the largest and oldest independent
5 consulting laboratories in the country. This is the
6 second independent laboratory to confirm that the new
7 Hit Parade filters best of all leading filter
8 cigarette. And then it goes through and compares it
9 to supposedly these other brands.

10 Do you see that?

11 A Yes.

12 Q Do you consider this to be a health claim?

13 A Again, I would say it is a weak health claim.
14 I would say it is weakly comparative that the
15 companies are identified as A, B, C through I, so that
16 a smoker of another brand would not know -- I think it
17 would be more comparative if they had actually named
18 the brands they were comparing to. It is a weak
19 comparative, weak health claim. I think everybody
20 thinks they are the best filtered cigarette.

21 Q Although -- that's what you want competitors
22 to do, go out there and compete on health claims?

23 A I want -- truthful health claims, yes.

24 Q Let's look at another copy.

25 A Strong, truthful health claims, yes.

03571

1 Vigorously compete on truthful health claims.

2 Q This is Time magazine. The date is blocked,
3 but the date will show up on the next page.

4 A That's George Beadle, isn't it?

5 Q Yes, it is. It is. This is actually for
6 another one of the members of the agreement according
7 to you, the cartel. This is a product of United

8 States Tobacco Company. Can you see that down at the
9 bottom, if you want me to get in on it.

10 A I believe that to be a product of the U.S.
11 Tobacco Company.

12 Q You do?

13 A I do, yes. That is my understanding.

14 Q In every comparison of cigarettes old or new,
15 filter or nonfilter, only King Sano smokers get less
16 nicotine and lower content, new full tobacco goodness.
17 And it goes on to tell the reader how this happens.
18 Because only King Sano tackles the problem where it
19 counts, in the tobacco itself. And it goes on to
20 explain how it does it. Only King Sano first reduces
21 tar and nicotine here, pointing to the tobacco.

22 Do you see that?

23 A I do.

24 Q Do you see that?

25 A I do.

03572

1 Q And then filters out even more here,
2 according to the filter. And then you get full
3 tobacco goodness here.

4 Do you see that?

5 A I do.

6 Q It goes on to describe down here a little
7 further, King Sano smokers have doubled again in the
8 last few months. More than 20 million people now know
9 the good news. King Sano reduces the nicotine and tar
10 so completely and captures the goodness of the finest
11 tobacco taste. And then they actually advertise their
12 nicotine and tar level. Do you see that?

13 A Yes.

14 Q Do you consider that to be a health claim,
15 Doctor?

16 A Again, I would say that is a weak health
17 claim.

18 Q These are the types of ads that wouldn't be
19 running if there was this exclusive conspiracy going
20 on, is that fair to say, Doctor?

21 A If the conspiracy were entirely effective at
22 this point in time, I think that even these ads might
23 not be running. But I think the nature of advertising
24 has changed quite a bit from the previous period.

25 Q For the record, this was Exhibit WX176.

03573

1 Let me show you one more. Liggett & Myers
2 had a cigarette called L&M. Are you aware of that?

3 A Yes.

4 Q This is actually the Seattle Times, June
5 24th, 1958 is what it says there. They said it
6 couldn't be done, but here it is. Puff by puff
7 today's L&M gives you less tars and more nicotine
8 (sic).

9 Do you see that?

10 A Sorry, less tars and more taste.

11 Q I apologize. Less tars and more taste.

12 Do you see that?

13 A Yes.

14 Q Now, goes on to say down here, enabling
15 today's L&M to give you puff by puff less tars in the
16 smoke than ever before.

17 Now, do you consider that a health claim?

18 A Again, I would say I would think of that as a

19 weak health claim.
20 Q Now, was Liggett & Myers, were they part of
21 this collusive agreement by this time?
22 A I don't believe so, no.
23 Q Well -- what is it you have seen they hadn't
24 joined yet?
25 A That they haven't joined yet? I'm not
03574
1 certain. I know that they were not in the agreement
2 in 1954. The earliest I can place them from company
3 documents where agreement -- where the firms met
4 together and agreed to do things is, as I say, 1963.
5 It is possible. My understanding is that they were
6 out from about the period 19 -- December 1953 when the
7 agreement started until sometime around 1963 just
8 before the '64 surgeon general's report. That's the
9 best dating of it that I have. There is some time
10 period in the middle where they joined. And I can't
11 date it precisely.
12 MR. FERGUSON: Mr. Webb, can I ask you the
13 exhibit number of that last one?
14 MR. WEBB: Yes. The last one is Exhibit
15 Number WX169.
16 MR. FERGUSON: Thanks.
17 BY MR. WEBB:
18 Q Now, sir, as an economist do you agree that
19 the competition that was taking place during the time
20 period that I just showed you those ads, 1957 to 1959,
21 are you with me in time?
22 A Yes.
23 Q Do you agree as an economist at the time the
24 competition that was going on between these tobacco
25 companies head to head against each other in trying to
03575
1 develop better filter cigarette products would be
2 described by an economist as extremely intense?
3 A I think there was advertising competition.
4 Whether it was a development of a filtered product
5 that actually did something or not is not clear from
6 the advertising. Certainly everybody seemed to
7 advertise that they were the best, that they had --
8 and I view -- that advertising was ongoing and perhaps
9 even vigorous at that time, that kind of advertising.
10 Q And that's not consistent with your theory of
11 collusion, is it, Doctor?
12 A No. I think it could have been more
13 vigorous. People could have said, explain to
14 consumers, for example, what the concerns were --
15 Q Could it also --
16 A -- what the health community was concerned
17 about and so forth.
18 Q Do you think it could also be evidence that
19 there never was any collusion?
20 A Perhaps if that's all there was -- if that's
21 all there was and it continued for the rest of time I
22 think you -- I would be inclined to reach that
23 conclusion, too.
24 During the same time period that we are
25 discussing Philip Morris, the company that you
03576
1 represent I understand, wrote the letter to the
2 president of the Tobacco Industry Research Council,
3 which was supposed to be the organization that was

4 going to get at the truth of smoking, and asked them
5 to try to get King Sano to stop writing to doctors and
6 making the sort of claims precisely that King Sano was
7 making in the ads that you show.

8 So if all there was was this vigorous
9 advertising and nothing else over the entire rest of
10 the record, then it would be hard to draw a conclusion
11 that there was collusion. But lots of other things
12 happened.

13 Q Let's see what happened. Let's find out what
14 did happen. This is Dr. Calfee's working papers, sir?

15 A Yes.

16 Q Do you still have it there?

17 A Yes.

18 Q So it is easy for you to follow, if it is. I
19 am on page 40.

20 A Okay.

21 Q I am highlighting. Do you see where I have
22 highlighted this?

23 A Yes, I found that part.

24 Q He describes it as vigorous competition to
25 produce lower tar cigarettes, occurred without the

03577

1 slightest government support or encouragement.

2 Do you see that?

3 A Yes.

4 Q Do you see what I have highlighted? He goes
5 on to describe that, by 1959 competition in the
6 normally placid cigarette market had become unusually
7 intense.

8 Do you agree with that statement, as an
9 economist?

10 A That is certainly what he said.

11 Q I am asking you if you agree with his
12 statement?

13 A I think they were competing in advertising.
14 As I say, there are multiple dimensions of
15 competition. And they were clearly competing in
16 advertising in the introduction of filter cigarettes.

17 Q And he says, in that one year all the big six
18 manufacturers, except Reynolds, the market leader,
19 introduced new filter brands, because most -- I'm
20 sorry, new filter brands, most of them very low in tar
21 and nicotine.

22 Advertising expenses were now exceeding
23 previous records, and the greatest amounts, both
24 absolutely and on a per cigarette basis, were for
25 filter brands.

03578

1 And then he says, at this point the Federal
2 Trade Commission abruptly stepped in.

3 Do you see that?

4 A Yes.

5 Q And he goes on to describe what happened in
6 1960, does he not, sir?

7 A Yes.

8 Q And let's see what he says.

9 A Yes.

10 Q He says, in 1960 the FTC ban on nicotine and
11 advertising.

12 Do you see that?

13 A Yes.

14 Q He says near the end of 1959 the Federal

15 Trade Commission contacted each major cigarette
16 manufacturer and suggested the tar derby should end.
17 The Federal Trade Commission staff reiterated its view
18 that tar and nicotine claims would be regarded as
19 conveying the additional claim that lower levels of
20 tar and nicotine reduced health risks.

21 Do you see that?

22 A Yes.

23 Q And so at least the Federal Trade Commission
24 viewed those ads that I just showed you as conveying
25 health claims, is that correct?

03579

1 A At least at this point in time.

2 Q It says the commission was legally free to
3 infer claims without considering any evidence other
4 than the advertising itself. The staff also indicated
5 it would now require scientific evidence that reduced
6 tar and nicotine provided significant health benefits.
7 And there is actually a footnote there.

8 Do you see that footnote?

9 A Yes.

10 Q Let's go down and see what that footnote
11 said. Up to now FTC Chairman Kintner -- that was the
12 FTC chairman at that time?

13 A That was my understanding, yes.

14 Q -- explained FTC ground rules required only
15 that a cigarette maker substantiate its tar and
16 nicotine figures with a report from an independent
17 research laboratory. Now the advertiser couldn't
18 mention tar and nicotine at all unless he could supply
19 physiological proof that the filter had something to
20 do with his cigarette's effect on smokers' health,
21 something no one has been able to establish.

22 A In 1960, yes. That statement is as of 1960.

23 Q In 1960?

24 A Yes. This, just so I understand it, this
25 explains the question that I raised about item 2 in

03580

1 the cigarette advertising guide that you mentioned
2 when you said it was significant. And you said it
3 would be a health -- significant health benefit.

4 And I said or just a significant difference
5 in the level of tar and nicotine. And apparently what
6 this says is, it was in fact only a significant
7 difference in the level of tar and nicotine, the FTC
8 did not in 1955 require the companies to substantiate
9 the health benefit of a lower tar and nicotine --

10 Q If there was any ambiguity about it they
11 certainly cleared it up here, did they not?

12 A This certainly clears it up, yes.

13 Q Because what this says is -- what the FTC
14 said to the tobacco companies, even these claims that
15 you call weak health claims, according to the Federal
16 Trade Commission, the tobacco companies had to stop
17 even doing that much unless they could prove that
18 lowering tar and nicotine had a positive effect on
19 health?

20 A Apparently in 1960 they reached that
21 position. Apparently before 1960 they said you could
22 say what the level of tar and nicotine was so long as
23 that was a truthful statement. And now in 1960 they
24 apparently are saying you now have to be able to show
25 it is truthful and that it actually is healthier.

03581

1 Q And -- it goes on -- Dr. Calfee goes on to
2 describe -- the Federal Trade Commission's new
3 standard was stringent because it required evidence on
4 the long-term effects of a type of cigarette, low tar
5 that was still new. It was widely understood that
6 such evidence did not exist and -- I'm sorry, did not
7 exist and could be obtained only through lengthy
8 epidemiological studies.

9 Do you see that?

10 A Yes.

11 Q And the footnote says, it was generally taken
12 for granted at the time that epidemiological evidence
13 on the effects of lower tar and nicotine did not
14 exist. Citing Newsweek, February 15th, 1960 at 74,
15 noted that nobody had been able to provide
16 physiological proof that filters reduced risk.

17 Do you see that?

18 A I do.

19 Q That's the point I was making with you
20 yesterday, unless you have these long-term
21 epidemiological studies you don't know for sure if a
22 new cigarette product is in fact bestowing a health
23 benefit?

24 A Again, the scientists, Dr. Henningfield and
25 Dr. Burns, are in a much better position than I am

03582

1 to provide what you need to know in order to recognize
2 the health benefits. So I take it from this that
3 those claims -- those advertisements perhaps should
4 not be interpreted as health claims because there was
5 no actual evidence at the time for consumers to
6 conclude that lower tar and nicotine was actually
7 healthier.

8 So the health conscious -- it is very
9 puzzling to me. It seems inconsistent.

10 Q Well, actually you wouldn't blame the tobacco
11 companies if a government agency ended up taking
12 inconsistent positions, would you?

13 A I am not concerned about the government
14 agency being inconsistent. I thought I heard you to
15 say in fact -- those advertisements were weak health
16 claims because a consumer could infer from a low tar
17 and nicotine number that low tar and nicotine was
18 better for them.

19 And now what I am being told in 1960 no one
20 was able to prove that that was true, there was no
21 evidence that that was true. So it would presumably
22 have been a misleading claim about the safety of low
23 tar and nicotine. I am just puzzled. I am just
24 confused.

25 Q Let me help you about this. What we are

03583

1 trying to find out is whether or not the cigarette
2 companies' advertising policies that took place over
3 the years --

4 A Right.

5 Q -- whether it resulted in collusion, or
6 whether it may be just result the because of actions
7 by the Federal Trade Commission?

8 A And decisions by the companies, yes.

9 Q Well, there is no question -- the Federal
10 Trade Commission said these are health claims?

11 A As of 1960 they changed their view and said
12 they were health claims.

13 Q And said to stop it?

14 A As of 1960, that's right.

15 Q Let's go on to see what happened. Then --
16 here is what happened. It says intense negotiations
17 followed the Federal Trade Commission's initiative.

18 Do you see that?

19 A I have to find the page.

20 Q Page 45.

21 A Yes.

22 Q Do you have it?

23 A Yes.

24 Q It says intense negotiations followed the
25 Federal Trade Commission's initiative. Early in

03584

1 February 1960 the Federal Trade Commission announced
2 that the Bureau of Consultation -- that's a bureau
3 within the Federal Trade Commission, is that correct?

4 A That is my understanding, yes.

5 Q -- has negotiated an industry wide agreement
6 to ban all tar and nicotine claims. Press accounts
7 suggested that at least one firm, Brown & Williamson,
8 which was greatly dependent on sales of filtered
9 cigarettes, strongly resisted before giving in.

10 Do you see that?

11 A Yes.

12 Q Now, we then find out what happened is
13 that --

14 A Actually hang on for a second. And there is
15 a footnote to that statement.

16 Q Do you want to read the footnote?

17 A Let's read the footnote.

18 Q Which footnote are you reading, 163?

19 A 163. It was the one that was at the end.

20 Q Do you want me to read that?

21 A Sure. Or I will read it or can you read it,
22 one of us. I just want to read it so it completes the
23 paragraph.

24 Q These accounts differ in size the effects the
25 ban would have on different firms. Brown & Williamson

03585

1 continued for a short while to advertise tar and
2 nicotine filtration for Life, one of the very -- one
3 of the very lowest in tar of all cigarettes then on
4 the market, and Viceroy. Brown & Williamson's
5 advertising for Life had been unusually aggressive,
6 emphasizing the use of the United States Testing
7 Service. Do you see that?

8 A Yes.

9 Q Now, Brown & Williamson had no business doing
10 that if they were part of this collusive agreement,
11 did they?

12 A They had an incentive to do that. It seems
13 to me that is -- that is consistent with what Mr.
14 Calfee -- Dr. Calfee is saying here. They depended
15 very heavily on low tar and nicotine cigarettes, and
16 so they had an incentive not to take part in this
17 agreement along with the FTC. They resisted agreeing
18 with the other companies that they would stop
19 advertising low tar and nicotine. So it is -- they
20 wanted to cheat on the agreement because it was really
21 to their benefit to cheat.

22 Some of the other companies that weren't
23 doing this in the first place didn't make such a big
24 difference to them. But Brown & Williamson really
25 depended on this. They didn't want to do this. It

03586

1 was in their private incentive to continue to
2 advertise, to continue to advertise low tar and
3 nicotine.

4 Q Do you think it might be evidence that there
5 never was a collusive agreement?

6 A That simply doesn't follow.

7 Q Well, says Brown & Williamson's advertising
8 by Life had been unusually aggressive. In December
9 1959 the Federal Trade Commission issued a complaint.
10 And on February 24th, 1960, Brown & Williamson, B&W,
11 signed a consent order. The order dealt with the
12 narrow issue of graphic demonstrations of filter power
13 and misrepresentations -- misrepresentation of the
14 status of the testing laboratory, but not with the
15 larger issue of tar and nicotine advertising in
16 general.

17 A Okay.

18 Q Now, let's go on and see what happened.

19 A So apparently this United States Testing
20 Service was some sort of a misrepresentation as well.

21 Q Actually, Doctor, whether it was a
22 misrepresentation or not, if Brown & Williamson is out
23 there aggressively competing in the marketplace making
24 health claims, why would they be doing that if there
25 is this collusive agreement going on?

03587

1 A The question is not whether they did it at
2 all, but how much of it they would do and how they
3 would respond to each other when they did it and what
4 they would do -- as I say -- to look simply at the
5 period of the '50s and ignore all the things that went
6 on through the 1980s and so forth is to miss the whole
7 picture.

8 You have to put the whole picture together.
9 Why would they be doing it? They were cheating on the
10 agreement. They wanted -- Brown & Williamson wanted
11 to take competitive advantage. The other firms didn't
12 want to be doing that.

13 Q We will take it all the way up to the '70s
14 and '80s, but let's take it one step at a time. It
15 says here, it was widely anticipated -- they are
16 talking now about after the ban.

17 A Are you with me? I am on page 46 now.

18 A Yes.

19 Q They are talking about after the ban on
20 nicotine and tar advertising, is that correct?

21 A Yes.

22 Q It says, it was widely anticipated that much
23 advertising would change immediately, which in fact
24 happened. Tar and nicotine claims were eliminated in
25 favor of yet more ways to describe the flavor of a

03588

1 filtered cigarette, just as in 1955 appeals to health
2 had been replaced by appeals to taste.

3 Lorillard's ads for Kent changed from filters
4 best for the flavor you like to a cigarette that
5 satisfies your appetite for a real good smoke, and the
6 new low tar Duke, Liggett & Myers, switched from

7 lowest in tars, to designed with your taste in mind.

8 Do you see that?

9 A Yes. We now know where Duke comes from.

10 Q Duke is Liggett & Myers?

11 A It is not American Tobacco. I was not sure
12 of that.

13 Q Now, you agree that this change of
14 advertising that we see taking place in 1960 when the
15 tobacco companies stopped advertising tar and nicotine
16 and focused on taste, that is not evidence of
17 collusion, is it? That is evidence they were
18 following what the FTC told them they had to do?

19 A It says -- there was a negotiation -- as I
20 read this, a negotiation among the firms and the FTC,
21 and they eventually got an agreement between the firms
22 and the FTC they would stop doing that. That is
23 consistent with collusion. It is also consistent with
24 the FTC telling them what to do.

25 Q Are you telling me that because the tobacco

03589

1 companies did what the federal regulatory body told
2 them they had to do that that is consistent with
3 collusion?

4 A I am not saying it is consistent with
5 collusion -- it would be to their advantage -- it
6 would be very much to the advantage of the industry to
7 get the government to help police this agreement for
8 them. There is lots of good economics on that. All I
9 am saying is that there were negotiations. Some firms
10 resisted, because it would have been in their narrow
11 self-interest -- their competitive self-interest to
12 continue to advertise low tar and nicotine.

13 Others, if we go on to read page 47, others
14 who are not American and Reynolds, who would never
15 advertise tar and nicotine content and therefore had
16 no need to alter their basic campaigns, would have
17 presumably felt differently, and an agreement was
18 negotiated, which included -- as I understand it, it
19 was negotiated between the companies and the FTC.
20 It is consistent with both collusion and consistent
21 with the FTC telling them what to do.

22 Q Just so I understand. If a federal
23 regulatory body tells tobacco companies, you must stop
24 doing this, or we are going to take legal action
25 against you, and then they negotiate -- and then they

03590

1 negotiate an agreement not to do it, why is that
2 evidence of collusion as opposed to doing what a
3 regulatory body is telling to you do?

4 A As I have tried to explain to the jury, one
5 of the problems that cartels face is this incentive to
6 cheat. And one of the strongest ways to get -- to
7 police cheating is to get the government to make
8 cheating illegal.

9 So it is very consistent with the interests
10 of the conspiracy to get the government to do the job
11 for you.

12 Q Okay. Just so I understand, Doctor, are you
13 telling the jury what happened here is between 1957
14 and 1959 the tobacco companies ran all these
15 aggressive filter ads competing against each other,
16 and that was a foil to entice the FTC to come in and
17 come down on their heads?

18 A No, I wouldn't characterize -- that is a
19 total mischaracterization of what I just said.

20 Q I thought that's what you said, got the
21 government to come in and police a collusive
22 agreement?

23 A That is a total mischaracterization of what
24 I said. There is an awful lot of good economic theory
25 on this. In fact, Milton Freedman believes that the

03591

1 strongest collusive agreements are the ones that are
2 enforced by the government. That in 1953 the industry
3 wanted to stop doing health advertising, wanted to
4 stop competing on the basis of health.

5 Between 1957 and 1959 there was a breakout of
6 competition in at least tar and nicotine claims, and
7 it would be very much in the -- at least among some
8 firms, as Mr. Calfee says -- and it would be very much
9 in the interests of the industry if they wanted to get
10 that to stop to agree with the FTC that they shouldn't
11 do it any more. Not to entice the FTC -- not to cheat
12 -- to entice the FTC into enforcing their agreement,
13 but once the cheating has broken out, and the FTC
14 comes and says we think this ought to stop, some of
15 them said, yeah, that is a pretty good idea, it ought
16 to stop.

17 Others, Brown & Williamson, said, we don't
18 want this to stop, because we are making money doing
19 this, this is good for us. But eventually they joined
20 in as well.

21 Q Should I change your chart -- your wheel --
22 should I add the Federal Trade Commission in as part
23 of the cartel?

24 A No.

25 Q I thought they came in to police the cartel

03592

1 at this point.

2 A I think it was in the interests of the FTC
3 that the FTC was willing to do this. But I don't
4 think that the FTC -- I dare say the FTC was not aware
5 of the agreement that had taken place at the Plaza
6 Hotel meeting in the first place. I don't think they
7 knew at all. I think the FTC was concerned about
8 claims that were truthful.

9 Q Well, I guess, Doctor, what we do see
10 happening, if we look at the time period from 1960 to
11 1966 --

12 A Yes.

13 Q Let me just ask you, based on your review of
14 the evidence, did you see that as Professor Calfee
15 said happened, that in fact the cigarette companies
16 began to advertise on taste and not on tar and
17 nicotine? Did that in fact happen?

18 A As a general matter, yes. As a general
19 matter, yes. Although there was apparently a little
20 bit -- some little bits of tar and nicotine
21 advertising according to Senator Calfee that went on
22 during this time and were not challenged. Generally
23 speaking, yes.

24 Q My question is, are you going to tell the
25 jury that because my client began to advertise taste,

03593

1 is that evidence that my client was part of a
2 collusive agreement?

3 A No, not in and of itself. Advertising taste
4 is the general means by which this industry has
5 competed for a long time.

6 Q And the fact that my client stopped
7 advertising the tar and nicotine levels for that six
8 year time period, you are not going to tell the jury
9 that is evidence of collusion, are you?

10 A Not in and of itself. Not necessarily. You
11 have to look at the whole picture of all the things
12 your client did during this time period.

13 Q Well, let's see what happened. So we take
14 that time period up to 1966. What happened in 1966,
15 if we tell the full story of the Federal Trade
16 Commission, the Federal Trade Commission then did a
17 complete about face, reversed its position, changed
18 its mind and told the tobacco companies to start
19 advertising tar and nicotine levels, is that correct?

20 A Yes.

21 Q Let's show that to the jury.

22 A Roughly speaking, yes.

23 Q Look at page 48. Do you have that in front
24 of you?

25 A Yes.

03594

1 Q Let me make sure I have the right page here.

2 A I don't think you do, necessarily.

3 Q I think that is the wrong page. Let me give
4 you the right page number.

5 A I think it is 54.

6 Q 54. You are correct. I will put 54 up to
7 show the jury what happened with the Federal Trade
8 Commission. We go up now to this time period 1966 to
9 1971. It says the Federal Trade Commission reverses
10 policy on tar and nicotine advertising.

11 It says, by 1966 the American Cancer Society,
12 the Public Health Service and other public health
13 figures were recommending that smokers switch to lower
14 tar cigarettes even though there still was no
15 epidemiological evidence that doing so was likely to
16 reduce risk.

17 Most of these same authorities also wished to
18 see advertising of tar and nicotine levels as a means
19 for encouraging development of better cigarettes.

20 Do you see that, sir?

21 A Yes.

22 Q And so if we go to the next page, page 54, at
23 the top it says, in the face of this pressure --
24 talking about pressure from the American Cancer
25 Society and public health groups, is that correct?

03595

1 A Apparently, yes.

2 Q In the face of this pressure, you remember
3 the FTC reversed its attitude and began to encourage
4 tar and nicotine advertising.

5 A Yes.

6 Q Professor Calfee goes on -- I didn't
7 highlight, let's read the whole paragraph. The about
8 face was not easily accomplished, however. The
9 commission had placed itself in a dilemma when it
10 engineered the 1960 ban. At that time the commission
11 had assumed that ads containing tar and nicotine
12 levels claimed by implication that lower levels were
13 associated with lower health risks.

14 Having inferred such a claim, the commission
15 had said that it expected substantiation despite
16 general agreement that substantiation by accepted
17 scientific means could not be produced for many years.

18 Now, in 1966, the Federal Trade Commission
19 apparently could countenance its tar and nicotine only
20 by forsaking the requirements that health claims be
21 substantiated.

22 Do you see that?

23 A Yes.

24 Q It goes on to say the commission escaped this
25 dilemma by simply announcing it would no longer regard

03596

1 tar and nicotine advertising as deceptive. That is,
2 it would no longer infer health claims from tar and
3 nicotine advertising, unless an explicit health claim
4 were appended, of course.

5 Do you have see that?

6 A Yes.

7 Q This was ironic in the extreme. Now, this is
8 a Federal Trade Commission economist saying this?

9 A Looking back.

10 Q Looking back on it?

11 A Looking back at it nine years later, yes.

12 Q The economist says, this was ironic in the
13 extreme. Consumers were at least as likely in 1966 as
14 in 1960 to adduce health claims from tar and nicotine
15 information.

16 Moreover, the commission explicitly justified
17 the new policy of encouraging tar and nicotine
18 advertising by saying it favored giving consumers as
19 much information about the risk involved in smoking as
20 is possible. This amounted to saying that tar and
21 nicotine information provides risk information.

22 Thus the FTC itself seemed to take for
23 granted that as a factual matter tar and nicotine
24 information -- tar and nicotine information
25 communicated health claims and that the level of tar

03597

1 and nicotine did influence the risk from smoking.

2 Nonetheless, the connection between tar and
3 nicotine levels and health was precisely what would
4 continue to be forbidden.

5 Do you see that?

6 A Yes.

7 Q There is a very important footnote there that
8 I want you -- I want you and I to show the jury. The
9 commission noted that -- this in 1966, right?

10 A '67.

11 Q You were right, 1967. The commission noted
12 that no evidence indicated that any cigarette was
13 completely, and on those grounds opposed advertising
14 that suggested any cigarette was safe or safer.

15 Do you see that?

16 A I do.

17 Q Were you aware that the Federal Trade
18 Commission had actually taken this formal position
19 that the cigarette companies under no circumstance
20 could ever advertise that a cigarette was safe or
21 safer?

22 A I read the footnote. It is not clear to me
23 from the footnote it is a formal position that no
24 cigarette company could ever advertise that any

25 cigarette was safe or safer. It opposed that

03598

1 advertising in a letter to the National Association of
2 Broadcasters. And I have read that footnote. Whether
3 that is the State position that it would be a
4 violation of the law to ever do that is not clear from
5 that footnote at least. Certainly they opposed it.

6 Q At least it sets forth what the Federal Trade
7 Commission's position was at that time?

8 A It said that they were opposed to that. That
9 doesn't mean that they win on that issue. That just
10 means that was their position on that issue. They
11 were opposed to it.

12 Q If the tobacco companies decide to follow the
13 positions of the Federal Trade Commission, do you view
14 that to be evidence of collusion?

15 A Not in and of itself, no. I think you have
16 to look at all of the evidence and all of the things
17 the firms have done, all of the meetings, the
18 communications they have had and the actions they have
19 taken in order to reach the conclusion that there was
20 collusion.

21 Q Let's see what the FTC -- after the footnote
22 it says, the confusing result was succinctly described
23 by one legal scholar, if you must -- according to this
24 legal scholar, the PHS, Public Health Service, urges
25 you to smoke filter cigarettes. However, a tobacco

03599

1 company caught advertising that filters are safer than
2 nonfilters will be prosecuted by the Federal Trade
3 Commission for false and deceptive selling.

4 Do you see that, sir?

5 A Yes.

6 Q Now, that decision by the Federal Trade
7 Commission basically told the tobacco companies you
8 are now free to advertise tar and nicotine, is that
9 correct?

10 A Yes.

11 Q Okay. Let's see what the industry said to
12 that.

13 A Yes.

14 Q The next paragraph reflects that, does it
15 not?

16 A Yes.

17 Q It said, industry reaction to the new policy
18 was remarkable. The advertising self-regulation
19 authority stuck with exactly the position the FTC had
20 forsaken, agreeing that tar and nicotine claims should
21 be banned because there still was no scientific proof
22 of the benefits of lower tar and nicotine.

23 Do you see that?

24 A I do.

25 Q Let's go down and look at the footnote. Thus

03600

1 Robert Meyner -- now, you have talked about him
2 earlier in your testimony. He was actually a former
3 governor, is that correct?

4 A I believe so, of Maryland. Yes, I believe
5 so.

6 Q He had been selected to be the administrator
7 of this voluntary cigarette advertising code, is that
8 correct?

9 A Yes.

10 Q Which had come into existence in what year?
11 A I would have to go back and look in the
12 document to be certain. Sometime between 1960 and
13 1966.
14 Q Was it 1964 to the best of your -- or do you
15 remember?
16 A I can't remember as I sit here. I know -- we
17 have skipped from '60 to '66 in Dr. Calfee's article
18 in having discussed the cigarette advertising code.
19 Q If you can find it in there, that's fine.
20 A I do think it was mentioned. But I am not
21 sure I can find it. I will take your word for it that
22 it was '64.
23 Q I will check to be sure that I am correct.
24 Somewhere between 1960 and 1966?
25 A I believe that's correct, yes.

03601

1 Q So reading this footnote, Robert Meyner,
2 administrator of the industry code, reacting to the
3 FTC's proposal to allow tar and nicotine advertising,
4 this administrator of the code took the position,
5 there is no adequate and relevant and valid scientific
6 data demonstrating that any specific amount of tar and
7 nicotine is significant in terms of health, and in the
8 absence of an adequate disclaimer of such significance
9 to health, such representations would reasonably be
10 regarded as false and misleading.
11 Do you see that?
12 A Yes.
13 Q He goes on to say -- this is what Dr. Calfee
14 said, this must have been cribbed from some FTC
15 attorney's brief written a few years earlier.
16 Indeed, as late as 1981 the Federal Trade
17 Commission staff reports continued to refer to the
18 lack of empirical evidence on the beneficial health
19 effects of lower tar and nicotine cigarettes.
20 Do you see that?
21 A I do.
22 Q Now, the truth is if we go back and look --
23 Dr. Meyner took the position that was absolutely true
24 because there were no epidemiological studies that had
25 surfaced yet showing that these cigarettes in fact --

03602

1 these low tar cigarettes in fact produced a health
2 benefit, is that correct, sir?
3 A You would have -- I am not familiar with the
4 history of epidemiology in this area. I would have to
5 defer to the doctors who know what epidemiology was or
6 wasn't available at different points in time.
7 Q Now, what happened after this, then, in 1970
8 the Federal Trade Commission changed its mind again,
9 is that correct?
10 A I believe so.
11 Q Actually, let's take this one step -- in
12 1970, before we get to them changing their mind again,
13 in 1970 the cigarette companies were substantially
14 limited again in the way they could advertise
15 cigarettes because there was a ban on all cigarette
16 advertising on television and radio, is that correct?
17 A That's my understanding.
18 Q And then also in 1970 the Federal Trade
19 Commission changed its mind again about the cigarette
20 and tar issue, and this time they took the position

21 that they were going to make it mandatory and require
22 that cigarette ads include tar and nicotine levels, is
23 that correct, sir?

24 I think it is on page 57.

25 A I am just looking for it.

03603

1 Q Do you have page 57 there?

2 A Yeah. Is it a footnote?

3 Q It is actually -- it is the last paragraph
4 before number 8.

5 A Okay.

6 Q It says in 1967 --

7 A Yes, I am sorry. You're right. I see that.
8 Yes.

9 Q So it says, by 1970 the policy reversal was
10 complete. In that year the major cigarette firms
11 signed a nonbinding pledge to use FTC tar and nicotine
12 ratings in all advertising?

13 A That doesn't say that it was mandatory.

14 Q Let's look at the footnote.

15 A All it said was -- that says that they agreed
16 -- the cigarette firms agreed to use the FTC ratings
17 system.

18 Q They didn't agree to it without a hammer over
19 their head, did they, Doctor?

20 Look at the footnote.

21 A It is a nonbinding pledge. Go on.

22 Q It says here -- it cites Brown & Williamson
23 Tobacco Company, et al., and the Federal Trade
24 Commission. The industry agreement was partly
25 prompted by FTC rule making then underway that would

03604

1 have required the tar and nicotine ratings in ads.

2 Do you see that?

3 A Yes.

4 Q And that is consistent with what you have
5 seen in other materials that the Federal Trade
6 Commission started a rule making proceeding to require
7 these tar and nicotine levels to be stated, is that
8 correct?

9 A It would have required tar and nicotine
10 levels to be stated, that's right.

11 Q Now, what happened after that, if we follow
12 the history of what happened, is that from 1970 all
13 the way up to 1998, to today, the cigarette companies
14 have followed that agreement they entered into with
15 the Federal Trade Commission, and all the ads they
16 have run they include tar and nicotine levels in their
17 advertisements, is that correct?

18 A I am not positive of that. I am still
19 looking here for the agreement -- I am still looking
20 here for the claim -- the statement that you make that
21 all the firms agree that they would mandatorily run
22 tar and nicotine ratings. All I have been able to
23 find is that there was a nonbinding pledge to use the
24 FTC tar and nicotine ratings in all advertising. That
25 is not to do independent testing, but when we do do

03605

1 tar and nicotine ratings we are going to use the FTC
2 method.

3 Q Let's go back and go through it so the jury
4 understands, if you are confused.

5 A Yes. You seem to be saying that the FTC

6 required tar and nicotine ratings --
7 Q They did exactly that, didn't they, Doctor?
8 A I don't see it here.
9 Q Let's take the jury through it. The Federal
10 Trade Commission is a federal regulatory body, is that
11 correct?
12 A That's correct.
13 Q They have an enormous amount of power, is
14 that correct?
15 A They have certain regulatory authorities,
16 that's correct.
17 Q And it says here that they, the Federal Trade
18 Commission, started a rule making proceeding that
19 would have required the tar and nicotine ratings in
20 ads, do you see that?
21 A Yes.
22 Q That means the Federal Trade Commission
23 started a proceeding to require the tobacco companies
24 to include tar and nicotine in their ads, is that
25 correct?

03606

1 A That's correct.
2 Q And then --
3 A And at the top -- go back to the top.
4 Q What happened is that then in the middle of
5 the rule making proceeding the tobacco companies and
6 the FTC entered into an agreement, is that correct?
7 A It says the major cigarette companies signed
8 a nonbinding pledge to use FTC tar and nicotine
9 ratings in all advertising.
10 Q That's correct.
11 A That's right. Not an agreement -- I'm sorry
12 if I am being -- if I seem to be being resistant here.
13 I am just trying to see where in this that they agreed
14 to publish FTC ratings -- the FTC ratings in all ads.
15 There was a proposal -- a rule making under way.
16 As I read it -- in response to that the
17 manufacturers agreed that when they did -- if and when
18 they did publish tar and nicotine ratings, they would
19 use the FTC's ratings and not their own independent
20 laboratory ratings.
21 Q Let's just read it together. By 1970 the
22 policy reversal was complete, and in that year the
23 major cigarette firms signed, apparently signed, an
24 actual nonbinding pledge to use FTC tar and nicotine
25 ratings in all advertising.

03607

1 A I'm sorry.
2 MR. FERGUSON: Your Honor, I suggest for
3 context that counsel read the footnote.
4 MR. WEBB: I just did.
5 MR. FERGUSON: The whole footnote.
6 MR. WEBB: I thought I read --
7 THE WITNESS: I'm sorry. I misunderstood it.
8 I took it to say they were going to use FTC tar and
9 nicotine ratings in all the advertising that had tar
10 and nicotine ratings, rather than in all of their
11 advertising.
12 BY MR. WEBB:
13 Q Let's read -- Mr. Ferguson wants us to read
14 the rest of the footnote. Do you see where it says --
15 the rule making proceeding led to this nonbinding
16 agreement, we have established that?

17 A Yes.
18 Q The proposed trade rule can be found in 35
19 Federal Register, 12671, 1970?
20 A Yes.
21 Q The Federal Trade Commission has taken the
22 position that this agreement does not have the force
23 of law and thus far the courts have agreed. Citing
24 FTC versus Brown & Williamson at 9.
25 Do you see that?

03608

1 A Yes.
2 Q In fact, individual firms have occassionally
3 used alternative measures of tar and nicotine in their
4 advertising and, until the ads for Brown &
5 Williamson's Barclay brand, the commission declined to
6 challenge this practice as unfair or deceptive.
7 Do you see that?
8 A Yes.
9 Q Citing the FTC versus Brown & Williamson?
10 A Yes.
11 Q The Barclay case is discussed below.
12 A Yes. That's what leads to my confusion.
13 That is consistent with my confusion. As I read that,
14 what it says is if you are going to advertise tar and
15 nicotine you have to use the FTC method, you can't go
16 to the U.S. Testing Service or Froehling and Robertson
17 or all those various independent labs that the
18 companies use. You are supposed to use the FTC's own
19 numbers. What was my -- not that it mandates that you
20 must have FTC numbers in every ad, but if you choose
21 to put a number in the ad, a tar and nicotine number
22 in the ad, it has to be the FTC numbers.
23 Q Actually, have you looked at the actual
24 agreement?
25 A No, I haven't. This is my understanding of

03609

1 it.
2 Q Just so you know, if you'll look up above, it
3 said, in that year the major cigarette firms signed a
4 nonbinding pledge to use FTC tar and nicotine ratings
5 in all advertising.
6 A Yes. I understand that. I'm not trying to
7 be annoying here. I am just trying to understand what
8 this nonbinding pledge means. I took that to mean in
9 all advertising in which there are tar and nicotine
10 ratings, not in every ad everywhere.
11 Q If you were to pick up a newspaper or an ad
12 today, Doctor, do you see the FTC tar and nicotine
13 ratings in the ads today?
14 A As a general matter I don't read cigarette
15 advertisements today. I am not a smoker. I know that
16 they often do appear, but that in the footnote it
17 still seems to say -- again, if you go on to read the
18 rest of the footnote that Mr. Ferguson suggested, it
19 seems to be more related to using alternative measures
20 in your advertising rather than using FTC numbers in
21 your advertising. I am just not entirely certain what
22 the statement in all advertising means there.
23 Q You too studied the advertising to give
24 accurate testimony to the jury, is that correct?
25 A I studied some advertising, yes.

03610

1 Q I assume you studied it up to the current

2 date?
3 A Some of it, yes. And I have read documents
4 about the sorts of campaigns that firms have run, yes.
5 Q So my question to you, sir, did you see after
6 this 1970 agreement that was signed by the tobacco
7 companies -- the date the agreement was signed, from
8 that date forward, have the tobacco companies
9 published in their ads the FTC rating?
10 A As a general matter when they publish numbers
11 they publish the FTC numbers, that is my
12 understanding.
13 Q And that is still going on today.
14 A As a general matter, as I understand today,
15 when they use the numbers -- when they publish numbers
16 they publish FTC numbers. Although as the footnote
17 says, that's not -- that agreement does not have force
18 of law.
19 And when Brown & Williamson used their own
20 numbers for Barclay, the FTC didn't challenge it on
21 the basis of any -- of being false and deceptive. So
22 as a general matter, yes, when they publish numbers
23 they publish FTC numbers.
24 And I believe that they often publish numbers
25 -- the only question I have is whether they are

03611

1 required to publish numbers, period, or whether that
2 is simply a matter of choice.
3 Q Do you know? Have you looked at the
4 agreement?
5 A By reading this, I am just confused.
6 Q I am asking you, have you looked at the
7 actual agreement?
8 A No.
9 Q Because if the evidence establishes that the
10 tobacco companies entered into an agreement with a
11 government agency, the Federal Trade Commission, to
12 run FTC nicotine and tar levels in their ads, if they
13 did that, do you believe that is evidence of
14 collusion?
15 A No, not in and of itself, no.
16 Q Thank you. Now, another major event took
17 place in 1972 regarding the regulation of cigarette
18 advertising, is that correct?
19 A Why don't we go on and explore that? I'm not
20 sure.
21 Q Do you remember in 1972 the Federal Trade
22 Commission actually started proceedings against the
23 tobacco companies to require them to put a warning in
24 cigarette ads to tell the public that cigarette
25 smoking is dangerous to your health?

03612

1 A Yes.
2 Q Do you remember that?
3 A Yes, I certainly am aware of that.
4 Q That was a pretty big event, was it not, sir?
5 A Yes, I believe that is an important event.
6 Q I will show you the consent decree that was
7 signed as a result of that.
8 MR. FERGUSON: Could I have the exhibit
9 number?
10 MR. WEBB: It is Exhibit Number WX134.
11 BY MR. WEBB:
12 Q I will provide you a copy. WX134. I will

13 show the jury the front page of this exhibit.
14 Your Honor, should I stop instead of going
15 through this exhibit? I will do whatever the Court
16 wants.
17 THE COURT: Let's stop. Since we are going
18 to have a short afternoon, let's resume at 1:15
19 instead of 1:30.

20 (Luncheon recess.)

03613

1 (Afternoon session.)

2 THE COURT: Please sit down.

3 BY MR. WEBB:

4 Q Are you ready, Doctor?

5 A Yes.

6 Q Now, Doctor, as we took our noon recess I
7 started to ask you about whether in 1972 -- whether in
8 1972 the Federal Trade Commission took action against
9 the cigarette companies to compel them to include in
10 all their cigarette advertisements a clear and
11 conspicuous disclosure of the statement that the
12 surgeon general has determined that cigarette smoking
13 is dangerous to your health.

14 Do you recall me asking you that question,
15 sir?

16 A No, but I will -- I remember we were
17 beginning to talk about that issue.

18 Q And I gave you that exhibit you have in your
19 hand, is that correct?

20 A Yes.

21 Q Let's show that to the jury. This is exhibit
22 WX134. This is a document involving a case of the
23 Federal Trade Commission, is that correct, sir?

24 A That's how I understand it, yes.

25 Q It appears that -- what this says is that it

03614

1 is a consent order in regard to the alleged violation
2 of the Federal Trade Commission Act.

3 Do you see that?

4 A Yes.

5 Q And let's see what this is all about. We
6 will read the first paragraph.

7 What it says is, consent orders requiring six
8 major cigarette manufacturers and distributors to
9 include in all their cigarette advertisements a clear
10 and conspicuous disclosure of the statement, warning,
11 the surgeon general has determined that cigarette
12 smoking is dangerous to your health.

13 The orders further provide the manner in
14 which the statement shall be presented in newspapers,
15 magazines and other periodical advertising, on
16 billboards, on all point of sale promotional
17 materials, and on all point of sale materials.

18 Do you see that?

19 A Yes.

20 Q And then it goes on to describe a complaint
21 that was filed against the tobacco companies by the
22 Federal Trade Commission.

23 Do you see that?

24 A Yes.

25 Q Now, if we go over to the next page, it is

03615

1 setting forth what the Federal Trade Commission was
2 alleging against the tobacco companies, is that

3 correct?
4 A I haven't had a chance to read it, but we can
5 read along.
6 Q Why don't you go ahead? Do you see where it
7 says "complaint" on the first page?
8 A I saw that.
9 Q And they start to list paragraphs, paragraph
10 1, paragraph 2. I am going to go down to paragraph 4.
11 If you think there is something else we
12 should show the jury, I will do so.
13 A I'm sorry. I have never seen this before.
14 Q That's all right. Have you not seen this in
15 preparing for your testimony?
16 A No, I have not seen this consent order, no.
17 Q As an expert in this case, were you aware
18 prior to me showing this to you that the Federal Trade
19 Commission had required at some point in time the
20 tobacco industry to include in cigarette
21 advertisements this warning that cigarettes are
22 dangerous to your health?
23 A I'm not sure that I was aware that it was the
24 Federal Trade Commission specifically. I certainly
25 know that the government -- some aspect -- I guess I

03616

1 may have thought that it was Congress, an act of
2 Congress. But I certainly knew that the government
3 required this warning since 1972. And I guess it has
4 changed into a rotating warning. At some later point
5 there were several warnings they rotate through. I
6 was certainly aware of that.
7 I wasn't aware it emerged from a consent
8 decree with the Federal Trade Commission.
9 Q We will go through this --
10 JUROR: Counsel, would you take another stab
11 at focus there.
12 MR. LUVERA: With your success rate, you
13 ought to let them do it.
14 MR. WEBB: Should I take that as a criticism?
15 BY MR. WEBB:
16 Q I will see if that helps by turning that
17 light on.
18 Let's go back and see if this does any
19 further at all. Does that light help a little bit?
20 Okay.
21 It says, paragraph 4, it says, in the further
22 course -- this part of the complaint -- you understand
23 a complaint to be a complaint filed against the
24 tobacco companies by the FTC?
25 A I understand that, yes.

03617

1 Q And the FTC is saying in paragraph 4, in the
2 further course of conduct a business, as aforesaid,
3 respondents -- that is referring to the tobacco
4 companies, is that correct?
5 A That is my understanding, this is a legal
6 document, and I am not a lawyer. That's what I
7 understand that to mean.
8 Q Okay. Respondents at all times mentioned
9 herein have been and are now in substantial
10 competition and commerce with other corporations in
11 the sale of cigarettes of the same general kind and
12 nature as those sold by respondents.
13 Paragraph 5. In the further course and

14 conduct of the business as aforesaid, and for the
15 purpose of inducing the sale of their said cigarettes,
16 respondents have employed and now employ extensive
17 advertising in many and various national and regional
18 media.

19 Paragraph 6. In the further course and
20 conduct of their business as aforesaid, respondents
21 have represented and are now representing in
22 advertisements directly and by implication that
23 smoking -- that smoking of cigarettes is a desirable
24 practice -- is a desirable practice --

25 JUROR: You need to raise that.

03618

1 BY MR. WEBB:

2 Q I'm sorry. Let me read that.

3 In the further course of and conduct of their
4 business as aforesaid, respondents have represented
5 and are now representing in advertisements, directly
6 and by implication, that smoking of cigarettes is a
7 desirable practice. In respondents' said
8 advertisements for their cigarettes, respondents have
9 failed to make clear conspicuous disclosures that
10 cigarette smoking is dangerous to health.

11 Do you see that?

12 A Yes.

13 Q Let's go to the next page.

14 In paragraph 8 the Federal Trade Commission
15 says, by advertising cigarettes to the public without
16 making clear and conspicuous disclosures in said
17 cigarette advertisements that cigarette smoking is
18 dangerous to health, respondents represent, directly
19 or by implication, that cigarettes are not dangerous
20 to health.

21 Do you see that?

22 A I do.

23 Q Now, let's stop right there. What the
24 Federal Trade Commission is saying there, that even if
25 we run an ad that only talks about taste or flavor,

03619

1 that by implication that is a health ad, unless we say
2 that it is dangerous to your health?

3 A I'm not -- it seems to me to say that it is
4 not a not health ad, it is not a danger ad. By
5 advertising -- by advertising cigarettes to the public
6 without making clear and conspicuous disclosures in
7 said cigarette advertisements that cigarette smoking
8 is dangerous to health, respondents directly, or by
9 implication -- represent directly or by implication
10 that their cigarettes are not dangerous to health.
11 It's not saying that they are healthy, they are not
12 saying that they are dangerous. Okay.

13 Q It says, therefore the advertisements
14 referred to in paragraphs 6, 7 and 8 above are false
15 and misleading and the acts and practices referred to
16 in said paragraphs are deceptive acts and practices in
17 commerce in violation of Section 35 of the Federal
18 Trade Commission act.

19 I will just go back to show you what they are
20 talking about in paragraphs 6 -- in paragraph 6 they
21 are talking about, that when we run ads we run ads
22 that talk about smoking being a desirable practice.

23 Do you see that?

24 A Yes. That's what they are saying.

25 Q Now, when I show you this paragraph 8, would
03620

1 that be an indication to you that the Federal Trade
2 Commission is taking a pretty hard stand against
3 cigarette companies doing or saying anything in their
4 ads that imply health?

5 A It seems to me that what the -- I interpret
6 this, the Federal Trade Commission is saying the
7 cigarette companies are not revealing a truthful fact
8 about their product, namely that the product is
9 dangerous to health, and that -- that's what it says
10 that they are doing, that those ads are not revealing
11 a truthful fact, that cigarettes are smoke -- sorry,
12 that cigarettes are dangerous to health, and that not
13 revealing that hazard of the product is false and
14 misleading.

15 Q Okay. I will accept that. Let's go on and
16 see what happened.

17 The consent order is set forth back towards
18 the back. If you go back -- actually the top of this
19 page, 63. Are you with me on that page?

20 A 63, okay.

21 Q Where it says "order" in the middle of the
22 page.

23 A Yes.

24 Q This is an order of the Federal Trade
25 Commission, is that correct?

03621

1 A I'm not sure of the legal -- it is a consent
2 order. Is that an agreement, like a settlement?

3 Q I am not trying to get into legalities. We
4 know from the front document this is called a consent
5 order?

6 A I don't know what a consent order is as a
7 technical matter. I'm not a lawyer. I don't know
8 what a consent order is compared to a settlement or an
9 agreement or whatever.

10 Q Let me make a representation to you, and if,
11 Mr. Ferguson, I have done it incorrectly, he can
12 correct me.

13 I believe essentially that a consent order is
14 an order in this case entered by the tobacco companies
15 after the Federal Trade Commission filed a complaint
16 against them making these allegations, and so they
17 entered into a consent order resolving the dispute?

18 A So they consented to do something in order to
19 resolve the dispute?

20 Q That's correct.

21 A Okay. So they have consented to do something
22 in order to resolve the dispute. Okay.

23 Q You can see there was a complaint filed
24 against by the Federal Trade Commission?

25 A I am aware of that.

03622

1 Q It is not unusual to settle legal matters?

2 A I am just trying to understand. You said it
3 was an order of the FTC, as if the FTC ordered them to
4 do something. I want to make sure I understand
5 whether the FTC was ordering them to do something or
6 whether they were agreeing to do something in order to
7 settle this dispute.

8 Q You will see -- do you see this?

9 A I see the words. I am not a lawyer and I

10 don't know entirely what it -- how one should
11 interpret that as a legal matter. That's all I am
12 asking.

13 Q That's fine. It says it is ordered --

14 A Okay.

15 Q Are you with me?

16 A Yes.

17 Q It is ordered that each respondent named in
18 the caption herein -- I won't read this legal
19 language, if you want to read it, can you -- do
20 forthwith cease and desist from advertising any such
21 cigarettes unless respondents make in all
22 advertisements of such cigarettes a clear and
23 conspicuous disclosure of the statement prescribed in
24 section 4 of the Public Health Cigarette Smoking Act
25 of 1969, which reads, warning, the surgeon general has

03623

1 determined that cigarette smoking is dangerous to your
2 health.

3 Do you see that?

4 A I see that. That helps to explain to me why
5 I was a little confused about whether it was as a
6 result of the FTC's consent decree or an act of
7 Congress that required this warning that -- I recall
8 the Public Health Cigarette Smoking Act of '69. And
9 so that was the act of Congress that I was referring
10 to.

11 Q That's fine.

12 A I am educated here.

13 Q So you now see what happened in 1972, the
14 Federal Trade Commission filed a proceeding against
15 the tobacco companies, and it is resolved with the
16 consent order you see set forth on the screen now, is
17 that correct?

18 A That is my understanding.

19 Q Now, the reason I ask you about that is
20 because in light of your theory, your economic theory
21 about the tobacco companies not competing against each
22 other on the basis of health claims, do you at least
23 agree with me, Doctor, that once the Federal Trade
24 Commission required that every cigarette ad must
25 contain the expressed warning that cigarettes are

03624

1 dangerous to your health, it would be ridiculous for a
2 cigarette company to turn around in the same ad and
3 advertise a cigarette as being safe or healthy?

4 Do you agree with that?

5 A To say that it is entirely safe or entirely
6 healthy, yes, I think I would probably agree with
7 that. To say that it is safer or healthier, I
8 probably wouldn't agree with that.

9 Q That's fine. I would like to --

10 Just so I understand what you are telling the
11 jury, are you telling the jury after 1972, when the
12 cigarette companies have to put right on the face of
13 the ad, cigarettes are dangerous to your health, that
14 a cigarette company ought to put in the same ads that
15 this cigarette is safer or healthier than some other
16 cigarette?

17 A If that were a true statement, I don't know
18 why they wouldn't do that.

19 Q You don't think that would be confusing to a
20 consumer to be told on the one hand that a cigarette

21 is dangerous to your health, and on the other hand
22 this cigarette is safer or healthier than another
23 cigarette?

24 A I think there are lots of products that are
25 more dangerous or less dangerous than others, although

03625

1 the general class of products might be dangerous. And
2 I don't see why it would be inconsistent to say these
3 products are dangerous, but some are less dangerous
4 than others. And if that is a true statement, and to
5 make that statement to advertise on that basis.

6 Q So you don't think once the Federal Trade
7 Commission told the tobacco companies that you must
8 put in your ads cigarettes are dangerous to your
9 health, you still think the tobacco companies should
10 have competed on health claims?

11 A If they had safer products and it was in
12 their independent self-interest to do that, and they
13 could substantiate those claims, those were truthful
14 claims, then I would expect to see, in a competitive
15 market, them doing exactly that.

16 Q Competing on health claims after they have to
17 put the warning in the ad?

18 A If they can make truthful health claims, say
19 that this product -- while cigarettes may be unsafe,
20 this product is safer than others, and it was a
21 truthful claim, and there was demand for that product,
22 I would very much expect to see firms doing that, yes.

23 Q Now, under your theory, in order for it to be
24 truthful there would have to be a scientific basis for
25 it, is that correct?

03626

1 A They would have to be able to substantiate
2 the claim scientifically, yes.

3 Q Let's apply that to specific products, then.
4 Because you identified, I believe -- let's see if I
5 can find your chart here.

6 This chart, as you prepared when Mr. Ferguson
7 was asking you questions, and you identified this
8 chart -- safer in quotation mark, cigarettes, and then
9 you drew a line here.

10 Do you remember that?

11 A Yes.

12 Q And you told the jury that these two
13 products, Saratoga and Premier, are products that
14 actually went into the marketplace?

15 A Yes.

16 Q But you believed were not being advertised
17 properly because of this collusive agreement?

18 A Yes.

19 Q Is that correct? Do I have that right?

20 A Yes. I don't think that they were advertised
21 on the basis of the health advantages that they had,
22 at least that the companies believed that they had.

23 Q We will start with Premier, then.

24 A If you like.

25 Q We will start with Premier and I will come

03627

1 back to Saratoga.

2 A Okay.

3 Q Let's tell the jury, so the jury -- let's
4 figure out what it is Premier was and what it is they
5 should have done under your theory of the case.

6 First of all, would you please describe what
7 Premier was to the jury?

8 A I can give you a layman's sort of my
9 understanding of it, because as I say, I may not know
10 all the technical details, but Premier was -- it was a
11 Reynolds product, and it was a cigarette that heated
12 rather than burned in order to generate nicotine. It
13 generated nicotine by heating rather than burning the
14 tobacco. As I understand it, it looks very much like
15 a cigarette, it has a little end, little thing at the
16 end that one would light with a lighter and that would
17 generate heat. It wouldn't burn -- the whole thing
18 wouldn't burn down, but that would generate heat.

19 Behind that, as I understand it, there is a
20 capsule that contains nicotine and glycerine, and the
21 heat -- by the heating element it would vaporize that,
22 that glycerine and nicotine, and that would form a
23 vapor.

24 The smoker would inhale that vapor through --
25 first through some tobacco which wouldn't actually

03628

1 burn but would be there to provide, I presume,
2 flavoring, and then through a filter. And what the
3 consumer would ultimately get was a heated vapor of
4 glycerin and nicotine. That's my understanding, as
5 best I can do for you.

6 Q And in your opinion, was Premier a safe
7 cigarette?

8 A I don't know if there is such a thing as a
9 safe cigarette. And I am probably not -- I rather
10 doubt that there is such a thing as a safe cigarette.
11 I am probably not the person to judge whether it was
12 in fact a safer cigarette or not. My understanding is
13 that the company -- that the Reynolds company believed
14 that it was a safer cigarette.

15 Q No one is going to let this product be
16 advertised because Reynolds believes it, are they,
17 sir?

18 A If Reynolds believes it and has data to back
19 that up, then I presume that's how it would be
20 advertised. I believe that Reynolds would need to be
21 able to substantiate their claim, their belief that it
22 was a safer product. My understanding is that
23 Reynolds had data to substantiate that belief. I
24 believe -- my belief, I'm not sure is particularly
25 relevant. I am relying on what I understand Reynolds'

03629

1 position to be.

2 Q Do you believe, based on what you have seen,
3 that this is a cigarette that was guaranteed to cause
4 less cancer, for example?

5 A I'm not sure I am in a position to evaluate
6 whether this cigarette was guaranteed to cause less
7 cancer or not. I am not the scientist. I don't know
8 -- I can't evaluate the medical data. My belief is
9 that the RJR Reynolds company -- sorry, the R.J.
10 Reynolds Company had its own data, its own documents,
11 and the documents I have read suggests that the
12 Reynolds company believed it had a safer product.

13 I am not sure I can evaluate the truth or
14 falsity of that data. You would have to ask somebody
15 like Dr. Henningfield or Dr. Burns.

16 Q But you are the one trying to tell us that

17 the failure to advertise this is part of a collusive
18 agreement.

19 A Yes. I am relying merely on my understanding
20 of the documents that Reynolds had and, for example,
21 the testimony of Mr. Johnson, who was the CEO of the
22 company, who I heard him to say it removed ninety
23 percent of the bad guys. I took him to mean cancer
24 causing chemicals or other harmful chemicals. I am
25 relying on his and the company's reputation about the

03630

1 product, not my own scientific knowledge about the
2 product, of which I am not a scientist.

3 Q Did you receive evidence in R.J. Reynolds
4 documents where Reynolds concluded that this product
5 was guaranteed to cause less cancer?

6 A I am not sure I -- I am not sure I can say
7 that they had -- that they had a document that said it
8 was guaranteed to cause less cancer.

9 Q As long as they -- if you didn't see any
10 documents like that, you are not suggesting to the
11 jury that R.J. Reynolds should have gone out with
12 blaring headline ads saying, smoke Premier, causes
13 less cancer?

14 Are you suggesting that to the jury?

15 A I am suggesting to the jury that what RJR
16 Reynolds should have said in its advertisement is only
17 the truthful statements that it could make based on
18 the data that it had. My understanding is that R.J.
19 Reynolds Company had information, in fact I believe
20 they presented a large amount of it to the health
21 community. As I recall, we heard Mr. Johnson say, we
22 presented a lot of information to the health community
23 in the hopes that they would explain the safety of the
24 product, and that they felt that it was a safer
25 product.

03631

1 They didn't say that to the public, but they
2 did seem to feel they could represent it to the
3 medical community. They believed that it was a safer
4 product. I am simply relying on Mr. Johnson and the
5 documents that the company presents.

6 Q Well, let's find out. Are you telling the
7 jury -- let me ask you this question. Just so I
8 understand, this product was announced by R.J.
9 Reynolds in the year 1987, is that correct?

10 A I believe that is correct, yes.

11 Q And so is it your testimony that when R.J.
12 Reynolds announced this product -- is it your
13 testimony that they didn't market it correctly because
14 of an agreement they had entered into thirty-four
15 years earlier, back in 1953?

16 A I think, as I explained somewhat yesterday, I
17 think that because of that agreement and the evolution
18 of that agreement, by 1987 they were really bound into
19 a position where they could not advertise that.

20 Q Let's find out. First of all, you just told
21 us that you heard Mr. Johnson testify that this
22 product had substantially reduced the bad guys?

23 A That was my understanding of what he said,
24 yes.

25 Q Meaning that it had substantially reduced the

03632

1 components that had been identified by the scientific

2 community as being potentially harmful, is that
3 correct?
4 A That, roughly speaking, is my interpretation
5 of what he said.
6 Q Let's just take that. Should R.J. Reynolds,
7 should they have announced and run ads that said
8 Premier substantially reduces many of the
9 controversial compounds that the scientific community
10 believes are harmful?
11 Should they say that?
12 A If that is a truthful statement, I think they
13 should have said that, yes.
14 Q Should R.J. Reynolds have advertised this
15 product as a breakthrough product?
16 A If they believed that it was a breakthrough
17 product, it could be a breakthrough product in a
18 variety of ways. If they believed that it was a
19 breakthrough product with regards to the safety of
20 smoking or the health effects of smoking, I think they
21 could have advertised it as such.
22 Q Should it have been advertised as a
23 revolutionary new product, in your opinion?
24 A Again, revolutionary can refer to a variety
25 of concepts. That is a very broad statement. I think

03633

1 if they felt that it was a revolutionary product with
2 regard to the smoking -- with regard to the safety or
3 health consequences of smoking, then they could well
4 have made that claim if they had data to back it up.
5 Q Let's see what Reynolds actually said in
6 their advertisements.
7 A Okay.
8 Q Have you seen some of the actual
9 advertisements?
10 A I believe I have.
11 Q Okay. Let me show you this one. This is
12 marked as Exhibit AS -- Defense Exhibit AS 324, in
13 evidence.
14 I will try to get all the way back so you can
15 get a picture. This is the first page. Let me get it
16 up here so you can see.
17 You see this is Wednesday, September 21st,
18 1988, the Arizona Republic.
19 Do you see that, sir?
20 A Yes.
21 Q It says, special report to smokers, number 1.
22 Do you see that?
23 A Yes.
24 Q It has been called revolutionary. We call it
25 cleaner.

03634

1 Do you see that?
2 A Yes.
3 Q Let's look at the next page.
4 It's the most talked about, most eagerly
5 anticipated new cigarette ever. It's a breakthrough
6 that changes the very composition of cigarette smoke.
7 It's remarkable new Premier, and its about to change
8 smoking forever.
9 Do you see that, sir?
10 A Yes.
11 Q That is pretty strong language, isn't it,
12 sir, particularly leading into the next paragraph?

13 A Compared to what? Go on.
14 Q It says, Premier is the first cigarette you
15 actually smoke by heating and not burning it. It
16 says, a discovery that substantially reduces many of
17 the controversial compounds found in the smoke of
18 tobacco burning cigarettes.
19 Do you see that?
20 A Yes.
21 Q Now, what I want to ask you, sir, is based on
22 your knowledge of Premier, what more could Reynolds do
23 in advertising this product based on the test data
24 that Reynolds had at that time?

25 A Well, I have seen mockups of other Reynolds

03635

1 advertising in which they say things like, fifty
2 percent fewer cancer causing compounds. If they had
3 data to support that, that it seems to me is a
4 stronger statement than many of the controversial --
5 we are not even going to say that they are dangerous,
6 they are just controversial compounds, found in the
7 smoke of tobacco burning cigarettes.

8 Q Doctor, you have to realize, am I correct,
9 when Reynolds designed this ad and ran it, they also
10 had to take into consideration the 1955 FTC guidelines
11 that told Reynolds in paragraph 1, as we showed the
12 jury this morning, that Reynolds is not supposed to
13 run any ad which sets forth what the physical effect
14 on the body of smoking is, is that correct?

15 A According to the guidelines, if they had done
16 that and they hadn't been able to substantiate it --
17 if they had done that, they would be likely to lose an
18 FTC challenge if they were not able to substantiate
19 it.

20 If there was truth to back it up -- I think
21 -- as I have read statements by the FTC, they have
22 consistently said that they are interested in the
23 truth. So if there was evidence to support that and
24 say it was a truthful claim that it had fifty percent
25 fewer compounds, the FTC might have challenged them,

03636

1 but they could win that case in court if they could
2 substantiate the truth of the claim.

3 Q So if Reynolds decides it does not want to
4 fight the entire federal government, is that evidence
5 of collusion?

6 A Not in and of itself. But if you could
7 succeed at this, according to the Reynolds
8 documentation that I have seen looking into the
9 failure of this product, that this was the greatest
10 latent demand in the market out there, there was a
11 large amount of money to be made if you could
12 successfully convince consumers -- if you could
13 produce and market a safer cigarette, one where
14 consumers understood the benefits was to their health.
15 And to not do that -- to not go through those steps,
16 go to the Federal Trade Commission, say, we have the
17 following data, this is what we are going to say,
18 we are only going to say things that we support, and
19 instead say something like this, it seems to me to be
20 walking away from an opportunity to make a large
21 amount of money. That is not consistent with
22 competition, with competitive behavior as I understand
23 it as an economist. It is consistent with collusive

24 behavior.

25 Q I thought you told me a moment ago you are

03637

1 not in a position to determine whether this is a safer
2 cigarette?

3 A No, but the document suggests that Reynolds
4 believed that it was a safer cigarette, Reynolds went
5 to the health community and presented them with
6 information, and we heard Mr. Johnson say they hoped
7 that the health community would support them in this.

8 Q So you think that Reynolds should have said
9 more than just that it substantially reduces many of
10 the controversial compounds found in the smoke of
11 tobacco burning cigarettes?

12 A If they had the data to back that up, which
13 it is my understanding they did.

14 Q In fact, this ad itself brought the entire
15 federal government down on Reynolds' head, didn't it?

16 A I am not aware of that.

17 Q Did you see what Dr. Koop said about this ad?

18 A No, I don't know what --

19 Q Do you know who Dr. C. Everett Koop is?

20 A Yes, I do.

21 Q Was he the surgeon general of the United
22 States at one point in time?

23 A Yes.

24 Q The most prominent public health official at
25 one time, sir? Strike the question.

03638

1 Do you believe the surgeon general is a
2 prominent member of the public health community?

3 A Yes, I would have no problem with that.

4 Q Have you seen what Dr. Koop said about the
5 fact that Reynolds was running ads that contained the
6 statements that the Premier substantially reduces many
7 of the controversial compounds found in smoke?

8 A No.

9 Q No one showed that to you in preparation for
10 your testimony?

11 A I have not seen what the surgeon general said
12 about that ad, no.

13 Q I will show it to you. And I will hand a
14 copy to you. This is in evidence as AZ8285.

15 And you can use that or I will put it on the
16 screen for the jury to see. It has been represented
17 during the case that the date is not clear, but that
18 this date is September 16, 1998.

19 Are you with me?

20 A I will take your word for it.

21 Q That is what has been represented to the
22 jury.

23 A I will take your word for that.

24 MR. FERGUSON: Since Dr. Solow hasn't seen
25 it, could we wait to give him an opportunity to read

03639

1 the whole document?

2 MR. WEBB: That's fine.

3 THE WITNESS: Okay. We can proceed. I have
4 had a chance to at least skim it.

5 BY MR. WEBB:

6 Q Okay. And the letter -- just so we show the
7 jury, this letter is signed by Dr. Koop, is that
8 correct?

9 A Yes.
10 Q Surgeon General of the United States?
11 A Yes.
12 Q And Dr. Koop is writing the letter to the
13 commissioner of the Food and Drug Administration?
14 A Yes.
15 Q Mr. Young?
16 A Yes. Dr. Young.
17 Q I'm sorry. Dr. Young.
18 I commend your action to infer the R.J.
19 Reynolds Tobacco Company, RJR, that if it decides to
20 market its new product Premier, it does so at its own
21 risk. I also support the careful process the Food and
22 Drug Administration, FDA, has initiated to review the
23 product and associated issues. I regret my schedule
24 precluded attending the recent meeting the FDA
25 convened with federal officials, and want to present

03640

1 written views. Because you are well-informed of the
2 product design and its genesis, my comments are brief.
3 He starts off by saying tobacco is an
4 optional ingredient.

5 I recognize that the FDA has not considered
6 cigarettes and other tobacco products, as customarily
7 marketed, to be within its jurisdiction. I submit
8 that the new cigarette is not a traditional tobacco
9 product. As the original patent and other documents
10 indicate, tobacco is not required to operate the
11 product or to deliver the nicotine.

12 Let's stop there. This product actually had
13 nicotine in it, is that your understanding?

14 A Yes.

15 Q By the way, if it has nicotine in it, could
16 it ever be called a safer cigarette?

17 A It could be a safer cigarette. Nicotine is
18 only one of the compounds that are in cigarettes. And
19 removing other compounds that are harmful -- for
20 example, I am not aware -- again, you really have to
21 rely on the doctors to tell you the medical issues,
22 but I am not aware that nicotine is related to --
23 itself is related to cancer.

24 As I understand it, and I am not the expert
25 on that area, it is other things in the smoke that are

03641

1 related to cancer. So it could be safer, not
2 necessarily safe. But, again, that depends on what
3 the medical community understands.

4 Q But, Doctor, would you believe Dr. Burns's
5 testimony on this issue would be more informative than
6 yours?

7 A With regards to the safety -- the relative
8 health risks of this product, yes, I would -- yes,
9 that's his expertise, not mine.

10 Q Okay. It goes on to say here, nicotine is an
11 addictive drug. The RJR data indicates its new device
12 is an effective nicotine delivery system, capable of
13 sustaining nicotine tolerance and physical dependence
14 due to tobacco use.

15 Do you see that, sir?

16 A Yes.

17 Q I want to go down to the next paragraph.

18 Product health claims are implicit. In its
19 public statements and marketing plans, RJR states,

20 regarding the product, a majority of the compounds
21 produced by burning tobacco are eliminated or greatly
22 reduced, including most compounds that are often
23 associated with the smoking and health controversy.

24 Do you see that?

25 A Yes. That's the sort of language that I
03642

1 thought might potentially go into an ad rather than
2 just controversial compounds, if that's a truthful
3 statement and RJR apparently made it publicly and I
4 think had evidence to back it up, yes.

5 Q Let's see what Dr. Koop says.

6 To me this suggests a health claim that the
7 product is safe or safer than conventional products,
8 which would result in reduced quitting by smokers,
9 increased relapse by ex-smokers, and increased
10 initiation by adolescents.

11 Do you see that?

12 A Yes.

13 Q And Dr. Koop goes on to state, because of
14 those reasons -- let's see what his conclusion is.

15 In conclusion, I consider this product to be
16 a nicotine delivery system for which health claims are
17 being made and urge you to exercise jurisdiction over
18 it, as you have other novel nicotine delivery systems.

19 Last sentence.

20 I do not believe that marketing this product
21 is in the best interest of the public health.

22 Do you see that, sir?

23 A Yes.

24 Q Now, when Dr. Koop concluded that Reynolds
25 should not market this product in the interest of

03643

1 public health, do you believe that Reynolds -- it
2 would have been fair for Reynolds to pay heed to what
3 Dr. Koop said?

4 A I think Reynolds should weigh the costs and
5 benefits, the profitability of introducing this
6 product and see what it would take to get the product
7 marketed. And if it felt -- if it were acting
8 competitively and felt it could make a profit by doing
9 that and by advertising it as -- advertising it
10 truthfully as to its consequences or its
11 characteristics, they should have tried to do that.
12 That would be competition. That would be consistent
13 with competition.

14 Regardless of what Dr. Koop says, if they
15 felt they could make truthful representations about
16 the product and as a result of -- and go through the
17 process of letting the Federal Trade Commission or the
18 FDA, if the FDA chose to exercise its authority over
19 the product, and see whether you can make any money
20 that way.

21 Q Do I understand your testimony, R.J. Reynolds
22 had to defy Dr. Koop or else that's evidence that they
23 are involved in collusion?

24 MR. FERGUSON: Objection. Argumentative.

25 THE COURT: Sustained.

03644

1 BY MR. WEBB:

2 Q Let me just ask you. Are you suggesting to
3 the jury that the fact that Reynolds did not defy Dr.
4 Koop is evidence that supports your theory of

5 collusion?
6 MR. FERGUSON: Same objection.
7 THE COURT: Overruled.
8 THE WITNESS: You have to repeat the
9 question.
10 BY MR. WEBB:
11 Q Are you suggesting to this jury that when
12 Reynolds did not defy Dr. Koop and market this product
13 in the competitive way you just suggested, are you
14 telling the jury that that's evidence of collusion by
15 Reynolds?
16 A Not -- no, not by itself. Not in and of
17 itself, no.
18 Q In fact, it wasn't only Dr. Koop but other
19 members of the public health community lashed out at
20 Reynolds for trying to market this product, is that
21 correct?
22 A I believe so.
23 Q And have you seen some evidence of that in
24 preparing for your testimony?
25 A I may have, yes.
03645
1 Q Did you see some evidence that the American
2 Lung Association lashed out at Reynolds for developing
3 and trying to market this product?
4 A I couldn't recall specifically who, but I do
5 know that aspects of the public health community were
6 upset about this product.
7 Q Let me show you another document that is in
8 evidence as Defense Exhibit AS392. I will hand a copy
9 to you and put a copy on the screen for the jury.
10 This is a letter from the American Lung
11 Association.
12 Do you see that?
13 A Yes. Of Eastern Missouri.
14 Q Of Eastern Missouri. I will go to the
15 signature page. It is signed by a variety of people
16 there.
17 Do you see that?
18 A Yes.
19 Q We can tell -- I will go in a little bit
20 closer.
21 This is Dr. Fisher, professor of psychology,
22 Washington University, St. Louis, Missouri.
23 Do you see that?
24 A Yes.
25 Q And a variety of other people who appear to
03646
1 be representatives of the public health community?
2 A In the State of Missouri.
3 Q Yes.
4 A I am just trying to make the point that it is
5 not the National Lung Association, it is the Eastern
6 Missouri brand of the lung association.
7 Q You are not representing that this is not a
8 reputable member of the public health association?
9 A You represented this as the American Lung
10 Association. I am pointing out it is the American
11 Lung Association of Eastern Missouri.
12 Q Okay. That's fine. Let's see what this
13 letter says.
14 It is addressed to a gentleman whose name is
15 Hayward Hourigan, president of the board of R.J.

16 Reynolds company.
17 Do you see that?
18 A Yes.
19 Q It says, this letter is in regard to your
20 invitation to attend a conference on your new tobacco
21 delivery system, Premier, October 13 and 14 in St.
22 Louis.
23 Do you see that?
24 A Yes.
25 Q Reynolds was trying to promote this product
03647
1 -- you heard Mr. Johnson talk about trying to promote
2 this product through the public health and scientific
3 community, is that correct?
4 A Yes.
5 Q By the way, do you consider that to be a
6 competitive act?
7 A It is an odd -- in and of itself it is not
8 collusive. If that's all that one does to promote a
9 product that you think has advantages that consumers
10 need to hear about, it is kind of an odd way to market
11 your product. Don't go to the consumers, go to the
12 health community and hope that the health community
13 goes to consumers. It seems like a fairly indirect
14 way of marketing your product. But I think it is not
15 in and of itself anti-competitive.
16 Q If you were -- if the Federal Trade
17 Commission's guidelines said that you are not allowed
18 to advertise a product and refer to its physical
19 effects on the body, and you are faced with that
20 limitation but you are still trying to find a way to
21 market your product, wouldn't it be a competitive act
22 to go out and see if at least the public health
23 community would jump behind you and maybe could you
24 market your product in that way?
25 MR. FERGUSON: Objection.
03648
1 Mischaracterization.
2 THE COURT: Overruled.
3 THE WITNESS: I don't believe that that is
4 the nature of the FTC's regulation of this product. I
5 think the FTC -- I think that the FTC, as I said
6 before, is interested in truthful claims. And if you
7 had truthful claims about the compounds that were
8 removed, and that those were significant, as the guide
9 says, you could try to make those claims so long as
10 they are truthful.
11 The FTC is interested in protecting consumers
12 -- the accuracy of information that consumers get. So
13 I guess I don't find the hypothetical particularly
14 believable.
15 BY MR. WEBB:
16 Q I will come back to the hypothetical, then.
17 I thought you told me the FTC guides had
18 never been amended or changed?
19 A That's right. They are guides.
20 Q We showed the jury this morning the first
21 paragraph of the guides. We can bring it back out, if
22 you want.
23 Do you remember the first paragraph that said
24 that a cigarette company is not allowed to have any
25 advertisement of any physical effect of smoking.
03649

1 Do you remember that?
2 MR. FERGUSON: Object to the
3 mischaracterization of testimony.
4 THE COURT: Overruled.
5 THE WITNESS: We could take a look at the
6 language, if you want to take a look at the explicit
7 language again.
8 BY MR. WEBB:
9 Q Let's do that, then. But let's finish this
10 letter, and then we will bring the guides back out.
11 A Okay.
12 Q This letter says that, your product is a
13 disturbing expansion of the marketing of tobacco and
14 nicotine addiction. It clearly should be reviewed by
15 the Food and Drug Administration before being marketed
16 to the public.
17 Do you see that, sir?
18 A Yes.
19 Q Now, let's look at the guides -- is it your
20 position that in 1988 R.J. Reynolds would have been
21 allowed to market this product by contending that it
22 caused less cancer, for example?
23 A I think what R.J. Reynolds might have been
24 able to do was to say that this -- to explain why this
25 product was a better product, to say what the concerns
03650
1 were about the compounds that it was removing. To use
2 the language I would think, like a majority of the
3 compounds produced by burning tobacco are eliminated
4 or greatly reduced, including most compounds that are
5 often associated with the smoking and health
6 controversy, language like that.
7 Q Let me talk about that. That language you
8 just read off, how is that different than the language
9 Reynolds actually used in this ad?
10 A It is a little bit more explicit about why
11 these are controversial compounds. It says those are
12 associated with the smoking and health controversy.
13 It seems to me that is a little bit stronger language.
14 If you are expecting consumers to be able to read this
15 and understand exactly what that is about.
16 By the way, Reynolds' own -- and other
17 companies' evaluation of this test marketing suggested
18 that consumers were not able to understand what the
19 controversial compounds language was about. They did
20 not perceive a benefit to themselves, and as a result
21 were sort of left in the dark about why this was a
22 preferable product for them to consume.
23 I just want to be -- I guess I would expect
24 the language, if you really were trying to do this
25 right, the language to be clearer. Premier announced
03651
1 this product, they were asked at the press conference,
2 are you saying this is a safer product, and are you
3 saying that the previous products that you have been
4 producing are unsafe? And they said, no, no, we
5 aren't saying that cigarettes are unsafe. This is
6 just a revolutionary product.
7 Q I just want to know, Doctor, so the jury
8 understands, what words do you want Reynolds to add in
9 here. Tell me what words are supposed to be added on
10 here.
11 A I'm not sure I want to be writing the

12 advertising copy. I would start, at the very least I
13 would start with things like, substantially reduces
14 many of the compounds that are often associated with
15 the smoking and health controversy.

16 How about that language?

17 Q Just that change, instead of saying
18 controversial compounds found in the smoke of tobacco
19 burning cigarettes, is it because they don't have
20 those additional words that is evidence of collusion
21 that goes back thirty-five years?

22 A That's not, all by itself, evidence of
23 collusion. It is consistent with collusion. It is
24 not evidence all by itself. I keep reminding you that
25 there are large numbers of documents which indicate

03652

1 that these firms were involved in a number of
2 collusive arrangements to do a number of things. They
3 had meetings. They made agreements. They enforced
4 those agreements. This piece of evidence by itself,
5 if that's all we had, would not be enough in my mind
6 to establish that there was a collusive agreement.
7 But I think when you look at the whole picture, and
8 ask why did they not make the stronger -- even the
9 stronger claim that I just read now, that is
10 consistent with collusion.

11 And at a time when the industry knew -- when
12 Reynolds knew that the safety in smoking, health
13 issues in smoking was the single greatest thing that
14 consumers cared about, why did they use language like
15 this that was confusing to consumers and didn't convey
16 the full benefits of the product.

17 Q What were they supposed to do about the
18 surgeon general of the United States believing even
19 this language was too much?

20 A As I understand it, people in companies in
21 the United States have a right to free speech. And if
22 the statements that they make are true, I don't see
23 why they shouldn't be able to do those, what the
24 surgeon general felt notwithstanding.

25 Q Do you think Reynolds may have been concerned

03653

1 about this, which we showed you this morning, these
2 are the cigarette advertising guides?

3 A Again, I will say to you that it seems to me
4 that Reynolds would have a right to -- commercial
5 speech is a kind of speech like other speech. They
6 would have a right to say what they wanted. And if
7 you couldn't prove that it was false or misleading --
8 in fact, I believe that the companies understood that.
9 There are documents where company executives -- I am
10 not sure necessarily whether it was Reynolds, I would
11 have to go back and look at the documents, but company
12 executives felt if they had a truthful claim to make
13 they could do it. If the FTC was upset about that
14 they would go to court and establish the truth of the
15 statements they made, and that they would be able to
16 win on that basis.

17 Q Let's look at paragraph -- I just want to
18 make sure we understand.

19 You said to bring this back out. So we will
20 look at that again. Paragraph 1 says that you can't
21 refer to the presence or absence of any physical
22 effect or effects of cigarette smoking in general or

23 in the smoking of any brand of cigarette.
24 Do you see that?
25 A Yes.

03654

1 MR. FERGUSON: Objection. Misrepresents the
2 document.
3 THE COURT: Overruled.
4 THE WITNESS: Could you repeat the question?
5 BY MR. WEBB:
6 Q Yes.
7 Does paragraph 1 say -- refers to either the
8 presence or absence of any physical effect or effects
9 of cigarette smoking in general or the smoking of any
10 brand of cigarette?
11 Do you see that?
12 A Paragraph 1 certainly says those words, yes.
13 Q And paragraph 1 makes it very clear you can't
14 even refer to the effect of cigarette smoking on any
15 part of the body?
16 A Paragraph 3 refers to those words --
17 paragraph 3 -- excuse me.
18 Can you say what the full statement is you
19 want me to agree or disagree with?
20 Q Does paragraph 3 says, in an ad Reynolds is
21 not even allowed to refer to the effect or effects of
22 cigarette smoking on any other part of the body?
23 A No. It says that they should not --
24 Q They should not?
25 A They should not, not that they must not or

03655

1 cannot, and this is a statement of the Federal Trade
2 Commission's attitude towards enforcing the laws
3 against deceptive advertising, and that this is the
4 FTC saying if you do this, we think we probably have a
5 case, and we think we are likely to call you on that.
6 But the truth or falseness of the claim will
7 ultimately be brought out in court.
8 Q Do I understand Reynolds, then, in order for
9 them to avoid an economist accusing them of collusion
10 they have to go ahead and run ads that they know will
11 cause a challenge and a lawsuit by the Federal Trade
12 Commission?
13 A I would certainly not characterize my
14 viewpoint in those words. Could we look at number 2,
15 please?
16 Q Yeah. Absolutely. We can look --
17 A It goes from 1 to 3.
18 Q We will say anything you want about 3,
19 sir.
20 A No, 2.
21 Q I have 2 right there.
22 A I just want to read, just for my own
23 purposes, so if it represents that any brand of
24 cigarette or the smoke therefrom is low in nicotine or
25 tars, or contains less nicotine, tars, acids, resins

03656

1 or other substances by virtue of its ingredients,
2 method of manufacture, et cetera, when it has not been
3 established by competent scientific proof applicable
4 at the time of dissemination that the claim is true,
5 and if true, that such difference or differences are
6 significant.
7 I guess it seems to me that a statement like

8 the one I read -- this is the RJR statement, a
9 majority of the compounds, we are talking about
10 compounds, those are other substances, I guess,
11 produced by burning tobacco or eliminated or greatly
12 reduced.

13 That's the low language. Including most
14 compounds that are often associated with the smoking
15 and health controversy. That doesn't refer to any
16 part of the body, nor does it say anything about a
17 physical effect. It doesn't use the word cancer,
18 which might be considered a physical effect. That
19 that language would fall within that section there.
20 And if you had competent, scientific proof applicable
21 at the time of dissemination that that claim was true
22 and was significant, then it seems to me even under
23 the guidelines you would be able to make that claim.

24 Q And that's the claim that Reynolds actually
25 made in this ad, isn't it? That's the actual -- in
03657

1 other words, Reynolds figured out exactly what you
2 figured out, that they could talk about the
3 substantial reduction of these controversial
4 compounds? Reynolds figured out they could go that
5 far and not violate the guidelines?

6 A Actually, Reynolds took that statement and
7 reduced it to controversial compounds rather than
8 compounds that are often associated with the smoking
9 and health controversy, which seems to me to be a
10 stronger statement about why one -- and make clearer
11 to the consumer why one should be concerned about
12 these compounds.

13 Q You don't assume consumers are ignorant, do
14 you?

15 A I think consumers need -- as a general
16 matter, I think people -- people vary in their level
17 of intelligence. I think their ability to understand
18 complicated questions like this -- this is not
19 something that the average person spends their time
20 studying. This jury has heard doctors talk about what
21 the scientific community understood about smoking and
22 health, and they know that to be a -- this jury knows
23 that to be a complicated question. Do you want to
24 suggest that by reading those words, many of the
25 controversial compounds found in the smoke, that the

03658
1 average citizen -- not to mention these jurors who
2 have sat and listened to doctors testify about this,
3 that they would understand the ins and outs of this
4 debate? That seems to me to be at least questionable.

5 Q That is the question. Are you telling me if
6 the average person in this country read that, in 1988,
7 with all the information about smoking and health that
8 was in the world, that you are telling me that when
9 the average consumer read an article that says,
10 substantially reduces any of the controversial
11 compounds, they wouldn't get it?

12 A The documents -- yes, I think the documents
13 from Reynolds and from Philip Morris evaluated this
14 product, the tests that Philip Morris did evaluating
15 why this product failed suggested that the people
16 didn't get it. It said they didn't understand the
17 personal benefits to themselves, and that they were
18 disappointed in that. They tried this product and

19 thought, well -- I thought there was -- that would be
20 in it for me. But it is really about not having
21 secondhand smoke and not about dropping ashes on the
22 floor, it is a cleaner product, and so forth.

23 The company document suggests that consumers
24 didn't get it.

25 Q How much did Reynolds spend to develop this

03659

1 product?

2 A At what point in time?

3 Q At any point in time, the total spent, do you
4 know, sir?

5 A I can't give it to you to the penny.

6 Q Approximately?

7 A Approximately, at this point in time I would
8 say roughly 300 million dollars over some period of
9 time.

10 Q Do you think Reynolds spent 300 million
11 dollars to develop a product and then they did not
12 advertise it as best they possibly could on what they
13 viewed to be the extent the law would allow them to do
14 so?

15 A Yes, I believe that Reynolds advertised this
16 product -- I take Ross Johnson's words for this, that
17 Reynolds advertised this product as being -- as
18 solving the social problem, the fact that -- when you
19 go out on the street and you see people standing out
20 in front of buildings because they have to smoke
21 outside these days, that is the social problem. I
22 took Ross Johnson at his word. They produced this
23 product and sold it -- and marketed it in the hopes
24 that people would buy it because it solves the social
25 problem of not filling up a room with smoke and

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1 causing other people -- secondhand smoke to other
2 people, bothering people with the smoke from
3 cigarettes, ashes on the carpet and so forth, and that
4 the reason why they did not advertise -- I think the
5 company understood to be the health benefits more
6 fully, is that as a result of this agreement that they
7 entered into, starting in 1953, where they denied that
8 there was any harm from smoking -- in fact, in 1988
9 when they announced this product they continued to
10 deny that there was any -- they were not admitting
11 that cigarettes were dangerous, they did that in the
12 press conference when they announced this product.

13 As a result of that they were simply so
14 concerned about the string of lies that they had told
15 from at this point thirty years, that they could not
16 make the health claim for that reason. Not because of
17 the law, but because they were afraid they had been
18 lying for so long that if they admitted that, they
19 would open themselves to litigation on the grounds
20 that they had been selling unsafe products for a long
21 time and not telling people the truth about that.

22 Q Now, Doctor, just so the jury can rely upon
23 evidence, will you tell this jury what R.J. Reynolds
24 document you saw that said the reason they didn't
25 market this product is because of this agreement they

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1 entered into in 1953?

2 A There is no document that says specifically
3 why are we not marketing this product on the basis of

4 health. It is because we have an agreement -- we
5 agreed in 1953 with other companies not to make these
6 claims. Again, as I say --

7 Q You have something like that, close to it?

8 MR. FERGUSON: Your Honor --

9 THE COURT: Were you finished with your
10 previous answer?

11 THE WITNESS: No. Again, as I say, we need
12 to look at the entire body of documents that were put
13 together, it is quite clear as a result of the ongoing
14 conspiracy, starting in 1953, by 1964, much less 1968,
15 the industry was concerned that this ongoing
16 conspiracy -- they had taken the wrong path and that
17 had put them into the position of having to tell
18 further lies and make further restrictions on what
19 they did so as not to admit that their current
20 products, Marlboros and the other brands, were in fact
21 unsafe products.

22 Q Okay. So you answered my question, you
23 haven't seen a document, is that your answer?

24 A I have not seen a specific document that says
25 the reason why we chose not to market this is because

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1 we met in 19- -- market this as a safer product, using
2 this sort of language that we have, the reason why we
3 chose not to do that is because we had an agreement in
4 1953 amongst other things that led -- that leads us to
5 this behavior. That's right.

6 Q You haven't seen that document?

7 A No, I have not seen a document like that. I
8 think you have to put the entire set of evidence
9 together and understand what is going on in this
10 industry over the entire length of time.

11 Q We are talking about -- we are talking about
12 this particular piece right now. So you haven't seen
13 a document that said that, is that correct?

14 A That's correct.

15 Q Did you see -- but is there some testimony
16 you have seen in a deposition or trial testimony
17 somewhere that would be evidence you can tell the jury
18 that's why it was done this way?

19 A Again, not one specific statement by any
20 person that says this is why it happened, but I think
21 the whole puzzle, the whole set of evidence and
22 documents fits together and suggests that that's why
23 -- that's why it was done -- that's why things were
24 done the way they were done.

25 Q You keep coming back to this mantra that we

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1 have to look at the whole puzzle, but if each piece of
2 the puzzle is defective will the picture be defective?
3 As an economist, do you believe that?

4 A I think if every single piece of the puzzle
5 can be shown to be untrue, yeah, I would have a hard
6 time staying with that. I think there are simply too
7 many pieces of this puzzle that all point in the same
8 direction.

9 MR. WEBB: Judge, I can go to the next topic
10 or do you want to recess?

11 THE COURT: I think we will go ahead and
12 recess.

13 I will see you Monday. Have a good night.

14 (Jury not present.)

15 MR. LOMBARDI: Your Honor, I think I am the
16 reason for calling you back out.

17 For the record, George Lombardi on behalf of
18 Philip Morris. Your Honor, in short what we wanted to
19 see you about, we have asked plaintiff for the right
20 to take the deposition of an upcoming witness. And
21 plaintiff has not agreed to do that. So we wanted to
22 raise the issue with you. The witness is Victor
23 DeNoble. Dr. DeNoble is a former Philip Morris
24 employee.

25 Let me give you a little bit of the history
03664

1 of Dr. DeNoble's involvement in this case. Dr.
2 DeNoble was not listed as a fact witness prior to the
3 close of fact discovery. As I recall, there were two
4 separate listings required of people with possible
5 factual knowledge. Dr. DeNoble was not listed in
6 either case. We got to the end of fact discovery and
7 then two weeks later plaintiff for the first time
8 listed Dr. DeNoble as a fact witness. We therefore
9 were not able to take his deposition on a factual
10 basis in the case.

11 Dr. DeNoble was listed as an expert witness,
12 and he was listed as an expert witness prior to the
13 close of fact discovery. But plaintiff never provided
14 the statement that the Court required for expert
15 witnesses. So we felt that that was an indication
16 that plaintiff was not serious about Dr. DeNoble and
17 did not take his deposition before the close of fact
18 discovery.

19 When we got the plaintiff's notice two weeks
20 after the close of fact discovery that Dr. DeNoble was
21 on the witness list for trial, we filed a motion to
22 strike him from the witness list. Your Honor denied
23 that motion in I think it was around August 21st, this
24 summer, and said that he could appear at trial.

25 You did not address, nor was the question
03665

1 raised with you whether we should have the opportunity
2 to take his deposition. We found out I think --
3 counsel, correct me if I'm wrong, I think it was last
4 week that Dr. DeNoble -- maybe it was the week before,
5 that Dr. DeNoble would be appearing at trial. I
6 understand not next week, but the week after.

7 And at that time we asked plaintiff for the
8 right to take a limited deposition of Dr. DeNoble.
9 And all we are asking for, your Honor, is four hours
10 to ask Dr. DeNoble some questions specific to this
11 case.

12 We need to take his deposition because Dr.
13 DeNoble has never been deposed in an attorney general
14 action. Dr. DeNoble has been deposed twice, to my
15 knowledge, since he left Philip Morris, which was
16 1984. He was deposed in 1988, and he was deposed in
17 1995. In neither situation was that deposition in an
18 AG case.

19 There are questions that are important to
20 this case that were never asked of Dr. DeNoble in
21 those contexts. So those depositions are not
22 sufficient. But we are not asking for the ability to
23 do some kind of A to Z start to finish exhaustive
24 deposition with him, because there are some things
25 that have been adequately covered before.

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1 So we are asking for the right to take his
2 deposition. We think this is a situation that is very
3 similar to what happened with Mr. LeBow. Mr. LeBow
4 was a late filed witness. Your Honor gave plaintiff
5 the right to call Mr. LeBow at trial, obviously, but
6 you also gave defendants the right to take his
7 deposition.

8 In that case defendants ultimately decided
9 that they didn't need his deposition. But the
10 important thing for our purposes right now is you gave
11 us the right to take that deposition.

12 So our request, Judge, is that we be
13 permitted to take a limited deposition of Dr. DeNoble
14 prior to the time he testifies.

15 MR. BERMAN: Your Honor, on October 7th, 1997
16 we identified Dr. DeNoble. We told the defendants
17 that the State may call -- and I am reading from our
18 disclosure -- certain of defendants' current and
19 former employees with percipient knowledge of facts
20 relevant to this lawsuit. Without limitation the
21 State identifies the following fact witnesses. And we
22 gave the defendants notice in October of 1997 that we
23 would elicit from Dr. DeNoble both facts and opinions.

24 The State -- the defendants never chose to
25 depose Dr. DeNoble prior to discovery cutoff. Then in

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1 May. Out of abundance of over caution, we designated
2 Dr. DeNoble again. And defendants moved to strike
3 him. Again, during all this period they never asked
4 to take his deposition, which they could have.

5 Then your Honor denied the motion to exclude
6 Dr. DeNoble because you concluded that we had
7 disclosed him as a fact witness. During the two
8 months or three months that have passed since the
9 denial of that motion, the defendants have never asked
10 to take his deposition until right before he is
11 supposed to testify. And the defendants say, well,
12 there are some new areas that we want to examine on
13 that haven't been covered before.

14 Your Honor, I asked Mr. Phillips who was
15 carrying the bar on this for the defendants at that
16 point, I said I would be glad to listen if you could
17 tell me the new area. Because they have already had
18 three depositions of this gentleman. He has testified
19 in front of Congress. So he has been subject to more
20 examination by these defendants than most witnesses
21 would get in a lifetime. But I said I will be
22 reasonable, if there is something that you think that
23 is important that you don't know about, you haven't
24 gotten, tell me what it is, and they haven't.

25 They said we believe Dr. DeNoble is going to

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1 make some statement about the Liggett XA project.
2 They said, well, it is in some speech he made. I said
3 if you show me what it is, and it is something new we
4 will be reasonable. But I never got anything,
5 nothing.

6 I respectfully submit to the Court they had
7 notice of the witness, they chose not to depose the
8 witness. The time has passed. Now, they believe,
9 well, there is something new that is out there that he
10 may know about. They won't tell us what it is, and

11 they have made no showing they are entitled to a
12 deposition.

13 Let me give you an analogy of the door that
14 could be opened here. There are witnesses, for
15 example Dr. Townsend, who you heard about from Dr.
16 Henningfield. Now Dr. Townsend goes to conferences
17 and we get reports of what he says. We elected not to
18 take Dr. Townsend's deposition. We have got
19 depositions of Dr. Townsend from other cases. Under
20 their theory, because he goes to a conference, and he
21 talked a couple of weeks ago about the FTC testing
22 method, now I can come in and say, well, right before
23 Dr. Townsend testifies I want to take a four hour
24 deposition of Dr. Townsend. And they have dozens of
25 witnesses I could do that for.

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1 If they are going to open the door to Dr.
2 DeNoble, then I suggest the State is going to want to
3 open the door for dozens of their employees who are
4 out there doing things every day that are relevant to
5 this case. The time has passed. They haven't
6 justified why we should subject Dr. DeNoble to a now
7 fourth deposition in tobacco matters.

8 THE COURT: Do you want --

9 Before I hear from you, do you want to
10 comment on the suggestion that, for better or worse --
11 and I know you didn't want to see Mr. LeBow redeposed,
12 but that was the Court's order. Is there a basis
13 besides the timing upon which that should be
14 distinguished?

15 MR. BERMAN: Yes, there is a readily apparent
16 basis. We didn't put Dr. LeBow on any list. Zero.
17 That was our problem. We've omitted him from the
18 list. DeNoble has been on the list six, seven months
19 prior to when discovery was past.

20 MR. LOMBARDI: Your Honor, just so there is
21 no confusion, I think counsel represented to you that
22 your order had been that there had been no late
23 disclosure of Dr. DeNoble. Here is what your order
24 says. Defendant's motion to exclude Victor DeNoble,
25 and a few others, as trial witnesses, denied. As to

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1 such witnesses, plaintiff has established a reasonable
2 excuse for late disclosure. And defendants are not
3 prejudiced.

4 That did not go to the question of whether we
5 should be entitled to take the deposition. It was a
6 late disclosure. The disclosure that was made was in
7 the context of expert witnesses, no statement was
8 filed the way the Court required it.

9 So we have a witness that was not disclosed,
10 and we have a witness that we did not have the
11 opportunity to depose during the relevant period, and
12 we are asking for the ability to take that deposition
13 in the exact same way as we were allowed to take the
14 deposition of Mr. LeBow.

15 THE COURT: Help me go back over some of the
16 procedural territory. You indicate that he was not
17 properly disclosed. What was the nature of the
18 disclosure, at least from your standpoint that
19 occurred, if any, on October 7, '97?

20 MR. LOMBARDI: The October -- if I have got
21 the dates right, your Honor, I think it was October

22 6th. There was a disclosure on the expert witness
23 lists by the State. They made a disclosure that
24 certain people could be called as expert witnesses.
25 And I think they actually did that again in November
03671

1 of '97. But if Dr. DeNoble was a bona fide expert
2 witness, your rules required that a statement be
3 submitted concerning his testimony. That statement
4 was never submitted by the plaintiff in this case.

5 THE COURT: I just heard from Mr. Berman the
6 representation -- and I don't know if it is a quote or
7 not, it might help me if I saw the actual disclosure
8 -- that he was coming up -- give that if you would to
9 the clerk, Mr. Berman -- that he was a current or
10 former employee with knowledge of facts.

11 MR. LOMBARDI: I believe that's what it says
12 in the context of an expert disclosure, your Honor. I
13 don't believe I have the document right with me. But
14 I think it was headed expert disclosure, I think was
15 the type of document it was.

16 I don't dispute that Mr. Berman read
17 accurately from the portion of the document that he
18 read from. But it is in the overall context of
19 disclosing expert witnesses to defendants which would
20 have required him, if this was a proper disclosure, to
21 subsequently submit a statement about Dr. DeNoble's
22 expected expert testimony.

23 THE COURT: What areas, if you are prepared
24 to tell me, would you be seeking to question Dr.
25 DeNoble in that have not adequately been covered by
03672

1 previous opportunities?

2 MR. LOMBARDI: Safer cigarette, generally,
3 your Honor. As we understand from some of his public
4 speeches that actually have been made this month,
5 there is testimony concerning safer cigarettes that
6 has never appeared in any deposition that we have
7 seen.

8 THE COURT: Does that go beyond XA to other
9 topics?

10 MR. LOMBARDI: As I understand it. I am not
11 sure what Mr. Phillips said to Mr. Berman, I wasn't
12 there. My understanding is it has nothing to do with
13 XA, which as you know, is a Liggett product. It had
14 to do with allegations of what Philip Morris did or
15 did not do with respect to a safer cigarette product,
16 is my understanding.

17 THE COURT: Since it is your motion, I will
18 give you the last word, but I do want to hear from Mr.
19 Berman a bit more.

20 MR. BERMAN: Two things I would like to
21 respond to. We didn't file an expert opinion because
22 he is not going to be called at this trial as an
23 expert witness. He is going to be called to testify
24 about facts that he knows about from his employment at
25 Philip Morris. Whatever opinion he may be giving
03673

1 about safer cigarettes is not an opinion that we
2 intend to elicit from him at trial. If he is talking
3 about the development of a safer cigarette that he has
4 factual knowledge of while at Philip Morris, we do
5 intend to ask him about that.

6 But they have had the opportunity in prior

7 depositions to ask Dr. DeNoble about what he knew
8 while he was an employee at Philip Morris.

9 And again --

10 THE COURT: Let me ask you -- maybe this is
11 putting more on the level of detail than you are
12 prepared for, which is fine. But was there
13 questioning at the prior depositions or in other
14 testimony that covered that territory?

15 MR. BERMAN: I don't know. I don't have all
16 his other depositions.

17 MR. LOMBARDI: Your Honor -- I will be very
18 direct about the one particularly troubling area that
19 we have heard that he has said publicly in the last
20 few weeks, and that has not been covered in any
21 deposition.

22 He apparently alleges that he had a
23 conversation with a Philip Morris in-house lawyer
24 about his idea for a safer cigarette. He said at this
25 public forum that the Philip Morris lawyer said to

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1 him, you can't do that safer cigarette because it will
2 be an admission of liability with respect to our other
3 cigarettes. And DeNoble -- and these public
4 presentations has said -- that he then said, what
5 about the people whose health will be compromised by
6 our failure to do this safer cigarette, and allegedly
7 the Philip Morris in-house lawyer then says they will
8 just have to die.

9 So this is obviously -- if plaintiff intends
10 to elicit that from Dr. DeNoble, a potentially
11 explosive evidence that has never been disclosed in
12 any deposition anywhere, and I think given the
13 circumstances here with the late disclosure, that we
14 should have the opportunity to depose Dr. DeNoble
15 about that.

16 THE COURT: Now, you made -- this is not a
17 criticism, but you made a broader suggestion earlier
18 about the scope. Is this the area, that you have just
19 now identified, the area that you believe is new and
20 fresh for exploration at any deposition that might be
21 allowed by the Court?

22 MR. LOMBARDI: That is clearly a new and
23 fresh area. Judge, I don't think it would go much
24 beyond that. But I think we would be able to ask Dr.
25 DeNoble whether there have been any changes in prior

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1 testimony he has given about safer cigarette and to
2 exhaust his recollection about any further
3 conversations of this nature that he may claim have
4 occurred

5 MR. BERMAN: Your Honor, if that's all they
6 want to do, I have a suggestion. First of all, that
7 wouldn't take more than forty-five minutes. If he had
8 one conversation, they don't need four hours to go
9 through one conversation, if that was their intent.

10 Two, I will talk -- I said if you have heard
11 the statement let me see it so I can go over it with
12 Dr. DeNoble. I will talk to Dr. DeNoble, and I will
13 be glad to inform the Court and counsel for Philip
14 Morris whether we intend to go into this conversation.

15 If we do, I agree to take his deposition, if
16 it is new, for an hour, but not for hour hours.

17 MR. LOMBARDI: Judge, it sounds like we may

18 be able to on that basis work something out -- maybe
19 four hours is overshooting it, number one -- to talk
20 to Mr. Berman about that. Maybe if Mr. Berman talks
21 to Dr. DeNoble, we can talk and work something out.

22 THE COURT: I think you can. It sounds as if
23 in principle there is an agreement. Let me help nudge
24 you in that direction by commenting that it seems to
25 me appropriate that a narrowly tailored deposition

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1 should occur, if there is this subject matter that
2 would be testified to at trial.

3 That's not to say what the timing should be
4 or the precise definition or the scope of that
5 deposition. I will give it to you if I have to. I
6 will hope that you can work it out.

7 MR. BERMAN: Can I ask for a little more
8 nudging. I will obviously talk to Dr. DeNoble about
9 this. I have asked them, if they have a speech -- if
10 they can tell me when he said it, where he said it,
11 maybe --

12 MR. LOMBARDI: He said it at Ohio state
13 University on approximately October 1st, and we don't
14 have a copy of the speech.

15 THE COURT: That seems accurate to me.

16 MR. BERMAN: I can go with that.

17 THE COURT: Any other issues from the
18 plaintiff's standpoint and then I will hear from the
19 defense.

20 MR. KACZYNSKI: Separate matter.
21 Housekeeping. It was discovered one of our
22 preadmitted exhibits, AS268, which was a Federal Trade
23 Commission report to Congress in 1956, had a paragraph
24 in it about the proposed national settlement.

25 I spoke with Mr. Ferguson, he said he would

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1 have no objection if we swapped in a copy deleting
2 that paragraph. But since it is admitted, I thought I
3 would take it up with your Honor.

4 THE COURT: I am glad you did. Why don't you
5 deliver that to the clerk? I am assuming that is
6 agreed by the State.

7 MR. BERMAN: Yes.

8 THE COURT: We will just substitute this
9 newly presented AS268 for the one that has been
10 admitted.

11 MR. KACZYNSKI: Thank you, your Honor.

12 THE COURT: Any other business on either
13 side?

14 See you Monday.

15 (Evening recess.)

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1
2 STATE OF WASHINGTON)
3 COUNTY OF KING)
4 _____)
5
6

7 We, James D. Lavielle, RPR, CSR, Barry Fanning,
8 RPR, Official Court Reporters for the Superior Court,
9 State of Washington, hereby certify that the foregoing
10 comprises a full, true and correct transcription of my
11 stenographic notes taken in the above-entitled cause.
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Dated this 22nd day of October, 1998.

OFFICIAL COURT REPORTER

James D. Lavielle, RPR, CSR

Barry Fanning, RPR, CSR